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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-436

DUPONT CIRCLE CITIZENS ASSOCIATION,
Petitioner,

v.

DISTRICT OF COLUMBIA ZONING COMMISSION,
Respondent.

NELLO PICCA AND CLAUDE L. BENNER, JR.,
TRUSTEES FOR EURANIA ASSOCIATES,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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The petitioner Dupont Circle Citizens Association respectfully prays that a writ of certiorari issue to review the judgment and opinion, as modified, of the District of Columbia Court of Appeals in this proceeding. Judgment was entered on January 19, 1976; the original opinion was filed on March 12, 1976; and the opinion was modified by order filed on April 19, 1976.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals, reported at 343 A.2d 296 (1976), appears in an Appendix hereto (Appendix B), as do its order denying the petition for rehearing *en banc* (Appendix A), its order modifying the opinion (Appendix E), its judgment (Appendix F) and District of Columbia Zoning Commission Orders Nos. 101 and 81 (Appendices C and D.).

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on January 19, 1976, with a proviso extending the time to file a petition for rehearing or rehearing *en banc* until 14 days after the later filing of the Court's opinion. The opinion was filed March 12, 1976 and was modified by order filed April 19, 1976. A timely petition for rehearing *en banc* was denied on April 26, 1976. The Chief Justice of the United States on July 23 and September 2, respectively, granted a timely application for extension of time and a timely application for further extension of time in which to file a petition for certiorari; and this petition for certiorari was filed within the time specified in the Chief Justice's order of September 2, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1257 and D.C. Code §11-102.

QUESTIONS PRESENTED

1. Whether a District of Columbia administrative agency's finding, which is central to the agency's decision but totally devoid of probative evidentiary support, renders the agency's decision unconstitutional under the due process clause of the Fifth Amendment.

2. Whether zoning regulations which accord to a favored few wealthy property owners the special privileges of con-

centrating mass and height through the devices of "transfer of development rights" and "planned unit developments," but which deny these rights to the great majority of property owners within the same zone, deprive the disfavored owners of property rights without due process of law, contrary to equal-protection as well as due-process concepts.

3. Whether the due process clause of the Fifth Amendment was violated when, in an adjudicative-type administrative agency case, (a) the agency failed to give notice or require notice to be given to a party of the scope of issues involved in a scheduled hearing, resulting in the party's losing the rights (i) to present evidence or (ii) to present argument or (iii) to cross-examine; and (b) the agency (i) failed to give that same party notice of its request, directed to opposing counsel, to file proposed findings of fact and conclusions of law, and (ii) failed to require service of the proposed findings and conclusions on the party's counsel, with the result that the party's counsel had no notice of the request and hence no opportunity to avail himself of this most important "last clear chance" to persuade the trier of fact by marshalling evidence and arguments in his own proposed findings and conclusions.

4. Whether the due process clause prohibits an administrative agency from "outlawing" a party by failing to give or require the giving of (i) notice of further *proceedings* and (ii) service of further documents in the proceedings, merely because the party's attorney has withdrawn solely from participation in a *hearing* in the proceedings in the good-faith but mistaken belief—known to the agency to be mistaken but uncorrected by the agency—that the scope of issues in the hearing was to be narrowly restricted.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constituion, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citzens of the Unitcd States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Dupont Circle Citizens Association ("Association") is a citizens' association whose members live and work in the Dupont Circle area. Its interests are to protect the liveability of its members' homes and the living and working environment and historic ambience of the Dupont Circle area. Over the opposition of petitioner and others, respondent District of Columbia Zoning Commission ("Commission") granted first preliminary approval (in its Order No. 81, Appendix D hereto) and then final approval (in its Order No. 101, Appendix C hereto) to a so-called planned unit development ("PUD") proposed by intervenor Eurania Associates (the "developer"). The site of the PUD is just south of Dupont Circle in the District of Columbia. *First*, the Commission changed the zoning from "SP"[1] to "C-3-B".[2] *Second*, it created within that C-3-B zone a super-density PUD area. And *finally* it permitted the developer to concentrate most of that super-density onto what is now a parking lot through a device called "transfer of development rights." The result, affirmed by the District of Columbia Court of Appeals, is to permit the developer to erect a super-high-rise, super-massive building there, approximately 50% higher and almost 100% more massive than would be permissible under the pre-existing standard SP zone—that is, a height of 130 feet (plus an additional 17 feet for roof structure) instead of 90 feet, and a mass or bulk of 8.9 FAR[3] instead of 5.5 FAR.[3]

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[1] A medium-density mixed residential and limited-office zoning category, intended as a buffer between high-density commercial zoning and residential zoning.

[2] A high-density commercial zoning category.

[3] "Floor area ratio": the ratio between total net square feet of floor space in the building and gross area of the lot on which the building stands.

In the District of Columbia, unlike other jurisdictions which permit PUDs, a PUD is not a separate zoning district. Instead, it is a much smaller area—in this case less than one full city block — which, according to the D.C. Zoning Regulations, can be set down anywhere within any of the regular zoning districts. Owners of properties within PUD areas receive special favors not available to their non-PUD neighbors in the same zoning district. These special favors consist of "relaxation of the [height, bulk and other] standards in the Zoning Regulations for the [zoning] district in which" the PUD is located.[4]

One such special favor, not normally available in most D.C. Zoning districts, is the ability to "transfer development rights." A property owner, whose building does not occupy all the permissible space on his lot, can sell the right to build in that vacant space to another property owner, who then somehow becomes entitled to build not in *that* space but in the equivalent amount of space located elsewhere. Thus, as in this case, much of the permissible bulk for the entire PUD area is concentrated onto one super-high, super-density portion of the PUD.

The special favors of a PUD are not available to the owner of a single, ordinary-sized lot, acting alone. A PUD usually must include at least an acre of ground—three acres in the lower-density zoning districts; and the developer applying for a PUD must go through a lengthy, three-stage administrative process requiring extensive services of attorneys, architects and planners. In sum, the D.C. PUD regulation is designed "to encourage" large-scale, new "development"[5] and is thus basically antithetical to preservation of historic structures and neighborhoods.

[4] D.C. Zoning Regs., §7501.24.

[5] D.C. Zoning Regs., §7501.1.

Nevertheless, "historic preservation" is the major justification offered both by the Zoning Commission[6] and by the court below[7] for extending special PUD favors to permit the developer in this case to construct a massive, super-size building immediately next to and overshadowing historic Heurich Mansion.

This "historic preservation" justification—the linchpin of both the Zoning Commission's and the lower court's decisions—is based upon the Commission's Finding (No. 22) that "the proposed sale of the development rights for the property owned by the Columbia Historical Society is *necessary in order to raise the funds required* to enable the Society to continue to maintain the historic mansion and surrounding property." (Emphasis added.) The underlying evidence relevant to this finding consists of the testimony of the Historical Society's Treasurer that "[w]e've made rough estimates in the neighborhood of $67,000 on, merely, deferred maintenance. . . . plus about $240,000 of long range improvements. . . And, those are based, merely on, you might call them 'guesstimates.' "[8] The Historical Socety's Treasurer testified and the Commission found that "the Society is not in financial debt" (Finding 21). In addition to the fact that the historic property is thus owned by the Historical Society free and clear of all debt, the following facts are also established and undisputed: The

[6] Findings 7, 18, 21, 22, 23, 25, and Conditions 3, 13, and 16 of Zoning Commission Order No. 101, and the 4-page Attachment No. 1 (pp. 25a, 28a-30a, 34a-36a, and 49a-52a, infra) all relate to "historic preservation." Finding 7 refers to the "transfer of development rights" — which the Commission allowed *only* for the purpose of "historic preservation" and otherwise disallowed because "no public benefit would be gained" — as being "[t]he most significant feature of this PUD."

[7] See pp. 5a and 15a-18a, infra.

[8] Tr. I 210.

Society has never sought any D.C. government subsidy (other than seeking and obtaining a special Act of Congress for real property tax exemption), although ample precedent exists in many other jurisdictions for such subsidies for historical societies; nor has it ever sought any federal government subsidy or grant (apart from status as a tax exempt charity); nor has it ever applied for any foundation grant for the purpose of historic preservation except once, when the Society sought *and received* "maybe . . . $15,000 at the time we took over the house. . ." for refurbishment.[9] There is no evidence that the Society has ever sought to raise any needed funds to maintain its debt-free valuable historic building by obtaining a mortgage, although it has agreed to sell the unused development rights items for $525,000 — vastly in excess of even its Treasurer's "guesstimates" of what is needed for historic preservation. There is no evidence that the Society has ever conducted a fund-raising drive for historic preservation of the mansion, either with the public or even with its own members; nor has it even advised its membership that there *is* any need for funds for preservation of the mansion. The undisputed evidence shows that the Society intends to use the $525,000 cash it is to receive for such things as installing central air conditioning and an elevator and erecting a new library and museum building on its lot; and it may use any excess income "for any other purposes it deems necessary or proper."[10] The original deed by which the Historical Society acquired the Heurich Mansion reveals that the property was donated to it because its "principal interest lies in the history of the District of Columbia. . . ;"[11] and there is no

[9] Tr. I 201, 209-214.

[10] Pp. 50a-51a, infra.

[11] Deed, April 19, 1955, recorded Book 10423, folio 178, D.C. Recorder of Deeds Office.

evidence to support the speculation (Commission Finding 22) that the *Historical* Society would be tempted to move out and sell its historic building in order to make a quick profit. The Society has never advised its membership that it has any such intention.[12]

In the first, preliminary-approval stage of this PUD proceeding before the Zoning Commission, petitioner's trial counsel entered his appearance and contested the developer's application vigorously both at the hearing and through submission of proposed findings of fact and conclusions of law. Despite knowing that petitioner continued to oppose the PUD[13] and despite Zoning Commission Rule 1.64 requiring "[p]roof of service" to be "shown for each document filed," intervenor failed to serve a copy of its final-application papers upon petitioner's counsel, thus rendering its submission of those papers an *ex parte* communication to the Commission; and the Commission's public notice of the final-application hearing specified only that the hearing was to consider the final application. Thus, petitioner had no notice and no knowledge that at the *final*-application hearing the Commission would *sua sponte* incorporate by reference the entire *preliminary*-application record and would thereupon reconsider and render new findings of fact and conclusions of law on the entire preliminary-application case.

Being thus in good-faith ignorance of the real scope of the final-application hearing, petitioner's counsel announced at its commencement that he was withdrawing from the *hearing* — not, be it noted, from the *proceeding* — because the hearing was to be merely "on the formalities of design" of "a building which we feel under the law

[12] Tr. I 455.

[13] Petitioner's petition for review of the Zoning Commission's preliminary-approval order was then pending before the District of Columbia Court of Appeals (Case No. 8237).

should not be constructed in the first place."[14] Even in the face of this announcement, both respondent and intervenor remained mute and failed to notify petitioner's counsel that the final-application hearing would go far beyond "formalities of design" and would include reconsideration of the entire preliminary-application case. As a result, petitioner lost the rights to present evidence and argument and to cross-examine the developer's witnesses at that final-application hearing.

At the conclusion of that final-application hearing, and with petitioner's counsel still absent, the Zoning Commission's Chairman requested the developer's counsel to submit proposed findings of fact and conclusions of law. Contrary to the Commission's practice previously followed in the preliminary-application stage, no written notice of this request was forwarded to petitioner's counsel, nor did he ever receive any other form of notice of knowledge of the request to submit proposed findings and conclusions.

Finally, again despite Zoning Commission Rule 1.64 requiring "[p]roof of service" to be "shown for each document filed," the developer failed to serve a copy of its proposed findings and conclusions upon petitioner's counsel, thus rendering its submission of these papers, like its earlier submission of its final-application papers, an *ex parte* communication to the Commission. Indeed, these latter papers were not even in the Commission's files of the case, so that even had petitioner's counsel searched the files he would not have found them. Thus, finally and irrevocably, petitioner's counsel lost this most important "last clear chance" to marshall evidence and argument in proposed findings and conclusions which he could have submitted had he but known of either the Commission's request or the developer's *ex parte* submission.

[14] Tr. II 5.

REASONS FOR GRANTING THE WRIT

1. THE COURT BELOW HAS UPHELD AS SUPPORTED BY THE EVIDENCE AN ADMINISTRATIVE FINDING CONCERNING "HISTORIC PRESERVATION" WHICH IS TOTALLY DEVOID OF PROBATIVE EVIDENTIARY SUPPORT. THIS IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, AND IT HAS NATIONAL IMPLICATIONS FOR USE BY DEVELOPERS OF THE SLOGAN OF HISTORIC PRESERVATION AS A MEANS OF OBTAINING VIRTUALLY UNLIMITED FREEDOM FROM ZONING RESTRAINTS IN HISTORICALLY IMPORTANT LOCATIONS WHERE ZONING RESTRAINTS ARE PARTICULARLY IMPORTANT.

This Court has long held that where a crucial judicial or administrative finding of fact is "totally devoid of evidentiary support"[15] or is "made upon evidence which clearly does not support it," this constitutes a denial of due process requiring reversal.

This is such a case. The Zoning Commission and the lower court both have justified their decisions on the basis of "historic preservation," but the Commission's Finding (No. 22), that "the proposed sale of the development rights . . . by the Columbia Historical Society . . . is *necessary* in order to raise the funds required" for the Society to preserve its historic Heurich Mansion property, is totally unsupported by any probative evidence. That finding is based on what the Society's own Treasurer described as "merely . . . 'guestimates'," unsupported by contractors' quotations or any other documentation whatever. As the court below

[15] Garner v. Louisiana, 368 U.S. 157, 163 (1961); Thompson v. City of Louisville, 362 U.S. 199, 200 (1960).

[16] Northern Pac. R. Co. v. Dept. of Public Works, 268 U.S. 39, 45 (1925).

itself observed in *Taylor v. D.C. Board of Zoning Adjustment*, 308 A.2d 230, 236 (1976), where as here, "the evidence as to economic hardship was conclusionary in nature as well as form," it is "without underlying basis." If such evidence is so lacking in probative value that it cannot support a finding of "economic hardship," *a fortiori* it cannot support the finding made in this case, and upheld by the court below, of *financial necessity*.

Moreover, that wholly unsupported finding of financial necessity flies in the face of the undisputed evidence that the Society could easily finance any needed historic preservation by placing a mortgage on its valuable and debt-free historical property; that the Society has previously obtained a foundation grant to pay for earlier needed historic preservation; that the Society has made no effort to obtain another such grant, or any subsidy, loan or contributions from any source, governmental or private — not even from its own members; and that the Society intends to use the $525,000 which it is to receive from the developer in this case for, *inter alia*, installing central air conditioning and an elevator and erecting a new library and museum building on the Mansion property, and that it may use any excess income "for any other purpose it deems necessary or proper."[17]

Experience has shown that, despite high hopes elegantly expressed,[18] urban renewal has had practically nothing to do with decent housing for low-income slumdwellers but quite a lot to do with super-profits for super-developers through displacement of those slumdwellers into even more miserable conditions. Just so, the evidence in this case shows that this PUD has absolutely nothing to do with historic preservation but quite a lot to do with central air

[17] See citations at pp. 7-9, supra.

[18] Berman v. Parker, 348 U.S. 26 (1954).

conditioning, a new elevator, a new building, money and the erection of a super-high, super-massive behemoth to overshadow and overpower an historic building.

Developers have not been slow to use the slogan of "historic preservation" as a means of obtaining freedom from zoning restraints in major cities throughout the United States.[19] Thus, the decision in this case can have "an import not confined to the Potomac's shores, but reaching far beyond." See *General Motors Corporation v. District of Columbia*, 380 U.S. 553, 556 (1965).

2. THE COURT BELOW HAS DECIDED THE QUESTIONS OF THE VALIDITY OF THE "TRANSFER-OF-DEVELOPMENT-RIGHTS" AND "PLANNED-UNIT-DEVELOPMENT" DEVICES IN SUCH A WAY AS TO CIRCUMVENT THE UNIFORMITY REQUIREMENT WHICH IS FOUND IN STANDARD ZONING ENABLING ACTS THROUGHOUT THE UNITED STATES AND WHICH IS BASED ON THE CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION AND DUE PROCESS.

The Standard State Zoning Enabling Act, which has been adopted by almost every state as well as the District of Columbia, contains a uniformity requirement as follows:[20]

[19] See Note, "Development Rights Transfer in New York City," 82 Yale L.J. 338 (1972); Costonis, Space Adrift (1974). Compare the use of the slogan "Preserve the Willard Hotel," now offered as justification for the *$1 billion* Pennsylvania Avenue Development Plan, whereas the original Plan's scheme to tear down the Willard to make way for a grandiose "National Square" is precisely what forced the Willard to close its doors, and although the cost of preserving the Willard itself has been estimated at only $20 million. ("The Pennsylvania Avenue Development Plan 1974" (Pa. Ave. Development Corp., 1974); "The Willard Hotel Feasibility Study" (National Trust for Historic Preservation, 1974).)

[20] Standard State Zoning Enabling Act, §2, 4 Anderson, American Law of Zoning, §26.01 (1968); D.C. Code (1973 ed.), §5-413.

"All such [zoning] regulations shall be uniform for each class or kind of building through each district. . ."

In *Unemployment Compensation Commission v. Aragan*, 329 U.S. 143 (1946), this Court granted certiorari because of the nationwide importance of a question involving construction of an Alaskan statutory provision which was similar to those of 43 states and territories.

The Zoning Act's uniformity requirement was intended, *inter alia*, to assure compliance with equal protection and due process concepts by protecting property owners within each zoning district from having the values of their properties adversely affected by the granting of improper discriminations and special favors to particular properties within the same zoning district. Such improper discrimination obviously occurs when particular properties are favored with "relaxation of the [zoning] standards . . . for the district."[21] Yet such "relaxation of . . . standards" is precisely what the District of Columbia PUD Regulation explicitly provides for.[22] As noted in 2 Williams, *American Land Planning Law*, §48.04, p. 231 (1975), "it cannot be seriously argued that such arrangements conform to the uniformity requirement."[23]

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[21] See 1 Anderson, American Law of Zoning, §5.17 (1968).

[22] D.C. Zoning Regs., §7501.24.

[23] Williams was referring to the usual PUD ordinance, in which each PUD is a separate zoning *district*, and was referring to the situation "where more than one PUD project is approved." Since "a separate deal is worked out for each project," the two PUDs are bound to be different and hence not uniform. *A fortiori*, in the Distirct of Columbia, not only is each PUD a separate deal, different from all other PUDs, a D.C. PUD is not even a separate zoning district, but simply an enclave within a district where special favors are granted which are not available to other properties in that district.

Williams goes on to state:[24]

"The final objection to the PUD approach is simply that the basic principle is wrong. Along with the obvious possibilities for favoritism and/or corruption, the establishment of such a system is a step away from government by rule of law, and back to the system of government by deal. From this viewpoint, planned unit development regulations are not a new idea; they are an invitation to regress, under rather stylish auspices, to the worst abuses of the past."

The D.C. PUD regulation is particularly objectionable because of its "transfer-of-development-rights" feature, which grants even greater special favors than some other PUD regulations by permitting concentration of much of the permissible bulk for the entire PUD enclave onto one small super-high, super-density portion of the PUD—which is exactly what happened in this case. As stated in "Development Rights Transfers in New York City," 82 Yale L.J. 338, 370-371 (1972), development rights transfer is not only not a "necessary" device for saving historic landmarks, nor even a "reliable" device, nor even a "serviceable" device. "Finally . . . [it] is a pernicious device in today's congested cities."

The court below *held* just what the Williams treatise has declared could not even be "seriously argued" — that the D.C. PUD regulation does not violate the uniformity requirement.[25]

Moreover, it so held in the face of the facts that the special favors of a PUD are not available to the owner of a single, ordinary-sized lot, acting alone, and that the

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[24] 2 Williams, American Land Planning Law, §48.04, p. 231 (1975).

[25] pp. 18a - 20a.

developer applying for a PUD must go through a lengthy, three-stage administrative process requiring extensive services of attorneys, architects and planners. Thus, by its nature as well as by its explicit language, the D.C. PUD ordinance "encourage[s]" large-scale "development"[26] and disfavors smaller property owners. This creates an invidious discrimination based on wealth, offensive to the equal protection and due process clauses.[27]

3. THE COURT BELOW HAS DECIDED QUESTIONS OF NOTICE AND OPPORTUNITY TO BE HEARD IN A CONTEXT — RELATING TO *EX PARTE* COMMUNICATIONS, RELATING TO "OUTLAWING" A PARTY FROM FURTHER NOTICES AND SERVICE OF DOCUMENTS IN A *PROCEEDING* AFTER THAT PARTY HAS WITHDRAWN SOLELY FROM A *HEARING* IN THE PROCEEDING, AND RELATING TO THE VITAL IMPORTANCE OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN ADJUDICATIVE-TYPE ADMINISTRATIVE PROCEEDINGS — NOT HERETOFORE DETERMINED BY THIS COURT BUT IN A MANNER PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT IN RELATED AREAS.

"[T]here can be no doubt that at a minimum [due process] require[s] . . . notice and opportunity for hearing . . ." and that *ex parte* communication between on party and the adjudicative body have no part in an adversary proceeding. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950), as quoted in *Goss v. Lopez*, 419 U.S. 565, 578 (1975).

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[26] D.C. Zoning Reg., §7501.1.

[27] City of Phoenix v. Kolodgiejski, 399 U.S. 204 (1970); see cases cited in Lubin v. Panish, 415 U.S. 709, 710-711 (concurring opinion). Felder v. City of Portsmouth, _____N.H. _____ 324 A.2d 708 (1974). See Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

Only recently this Court has held in a criminal case that "closing argument is the last clear chance to persuade the trier of fact," and "no aspect of . . . advocacy could be more important than the opportunity to marshall the evidence for each side before submission of the case to judgment." *Herring v. New York*, 422 U.S. 853, 95 S.CT. 2550, 2553, 2555 (1975).[28] Obviously, the submission of proposed findings of fact and conc. sions of law plays at least as much of a pre-eminently in. ortant role in the administrative process as does closing argument in a criminal trial.

This Court has not yet decided the applicability of the *Herring* principle to adjudicative-type administrative

Nor has this Court yet decided the applicability of the fundamental requirements for notice and opportunity for hearing in the precise context here presented — where one party is treated as being "outlawed" from further notices and service of documents in an entire *proceeding* because the party's counsel withdrew solely from a *hearing* in that proceeding, based on his good-faith misunderstanding, induced by the agency's and opposing counsel's silence and failure to notify him, as to the scope of the hearing.

Thus, this case presents issues as to the applicability of familiar principles in novel and important contexts. Therefore, it falls within the principle announced in *Public Utilities Commission v. Pollak*, 343 U.S. 451, 458 (1952), where this Court "granted certiorari . . . because of the

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[28] In Lewis v. Holzman, 524 F. 2d 761, 766 (9th Cir.), cert. denied, 44 U.S. Law Wk. 3531 (March 22, 1976), the court held that for a referee in bankruptcy to request one party to prepare findings and conclusions but fail to notify the opposing counsel or give him "an opportunity to object," violated "simple judicial fairness" and raised "serious doubts concerning the integrity of the referee's fact-finding processes."

novelty and practical importance to the public of the questions involved."

The relevant facts on this aspect of this case are set out at pages 9-10, supra. We will add here only one observation: The Court of Appeals asserts that petitioner's claim of denial of due process is "particularly untenable" because of counsel's withdrawal from the hearing (although, as stated, he did not withdraw from the proceeding). This assertion by the court is itself, we submit, "particularly untenable." If, in a criminal case, counsel — or the defendant himself — should withdraw from the sentencing hearing for the announced reason that the defendant "should not have been convicted in the first place," surely the Judge and prosecutor cannot be permitted silently to wait for him to withdraw and then proceed to introduce additional evidence and propose and make additional findings and conclusions, not simply on the question of what punishment to impose, but on the question of guilt or innocence. No more should such an outrageously unfair procedure be tolerated in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Court of Appeals.

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September 23, 1976

APPENDIX A

DISTRICT OF COLUMBIA
COURT OF APPEALS

Filed April 26, 1976
Alexander L. Stevas, Clerk

No. 8237 and 9159 January Term, 1976

DUPONT CIRCLE CITIZENS
ASSOCIATION
Petitioner

v.

DISTRICT OF COLUMBIA
ZONING COMMISSION
Respondent

NELLO PICCA & CLAUDE BENNER, JR.
as TRUSTEES FOR EURANIA
ASSOCIATES
Intervenor

BEFORE: Reilly, Chief Judge; Kelly, Fickling, Kern, Gallagher, Nebeker, Yeagley, Harris and Mack, Associate Judges

ORDER

On consideration of petitioner's petition for rehearing en banc, of petitioner's supplemental citation in support thereof, the motion of Kalorama Citizens Association for leave to appear as amicus curiae and of intervenor's opposition thereto and it appearing that no judge of this Court has called for a vote on petitioner's aforesaid petition for rehearing en banc, it is

ORDERED that petitioner's petition is denied.

PER CURIAM

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APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 8237, 9159

DUPONT CIRCLE CITIZENS ASSOCIATION, PETITIONER,

v.

DISTRICT OF COLUMBIA ZONING COMMISSION, RESPONDENT,

NELLO PICCA and CLAUDE L. BENNER, JR.,
TRUSTEES FOR EURANIA ASSOCIATES, INTERVENOR.

Petitions for Review of Orders of the
District of Columbia Zoning Commission

(Argued January 6, 1976
Decided by judgment January 19, 1976
Opinion filed March 12, 1976)

George F. Bason, Jr., for petitioner.

Leo N. Gorman, Assistant Corporation Counsel, with whom *C. Francis Murphy*, Corporation Counsel at the time the brief was filed, *Louis P. Robbins*, Acting Corporation Counsel, and *Richard W. Barton*, Assistant Corporation Counsel, were on the brief, for respondent.

Norman M. Glasgow, with whom *Whayne S. Quin* and *John F. McCabe, Jr.*, were on the brief, for intervenor.

Before REILLY, *Chief Judge*, and YEAGLEY and MACK, *Associate Judges*.

[290]

YEAGLEY, *Associate Judge*: These consolidated appeals are from two orders of the Zoning Commission based upon a preliminary and a final application for approval of a Planned Unit Development (P.U.D.) under Article 75 of the Zoning Regulations. They were resolved by a judgment that issued January 19, 1976, affirming the two orders of the Commission stating that an opinion would be filed at a later date.

The applications for the P.U.D. were filed by property owners in Square 115, a triangular plot consisting of over 66,000 square feet in northwest Washington bounded by Dupont Circle, 19th Street, Sunderland Place and New Hampshire Avenue. The properties involved in the proposal are the Euram Building on Dupont Circle, owned by the Euram Corporation, the Christian Heurich Memorial Mansion at the corner of New Hampshire Avenue and Sunderland Place, owned and occupied by the Columbia Historical Society, the Sunderland Building at the corner of Sunderland Place and 19th Street, owned by Arthur H. Keyes, and a parking lot in the midst of those buildings formerly owned by Dupont Circle Joint Venture, the original intervenor herein.[1] The Euram Building was zoned C-3-B (*see* D.C. Zoning Regs. § 5103) with the balance of the area zoned SP (*see* D.C. Zoning Regs. § 4101).

The purpose of the Planned Unit Development provision as set forth in § 7501.1 of the D.C. Zoning Regulations is

> . . . to encourage . . . in keeping with the intent and purpose of each [zoning] district, the development of well-planned residential, institutional and commercial developments, industrial parks, urban renewal projects or a combination thereof, which will offer a variety of building types with more attractive and efficient overall planning and design without sacrificing creative and imaginative planning.

[1] As a result of a transfer of title, Nello Picca and Claude L. Benner, Jr., trustees for Eurania Associates, have been substituted as intervenors.

Intervenor submits that the two applications are in compliance with the provisions of Article 75 of the Zoning Regulations. The proposed P.U.D. encompasses the existing buildings in Square 115 and a new 12-story office building to be constructed on the parking lot, with allotted retail use on the first floor and part of the next floor below. Approval of the plan would entail the rezoning of the SP area to C-3-B. The floor area ratio (F.A.R.) requirement of the Zoning Regulations would be met by the sale and transfer of development rights from the Columbia Historical Society to the intervenor.[2] As a result the total density of the P.U.D. would be less than the maximum permitted in a C-3-B zone. The Columbia Historical Society was to be made more financially secure by the substantial amount of money to be paid it for its development rights thereby assuring its continued operation. The Heurich Mansion, its garden and open spaces were to be preserved. Further openness was to be attained through the use of pedestrian arcades, one of which would facilitate access from New Hampshire Avenue to the new Metro station directly across from the project on 19th Street.

[2] Under a C-3-B zoning the Historical Society would have an unused development potential of 97,175 square feet. The final order approved the sale and transfer of 82,000 square feet for the new building making the effective F.A.R. of the proposed building 8.9 and the overall F.A.R. of the site 6.5.

At the hearing on the preliminary application, reports were received from the Zoning Advisory Council, the National Capitol Planning Commission, the Joint Committee on Landmarks of the National Capitol, and the National Trust for Historic Preservation as well as from the Zoning Commission's Staff. Each of these groups recommended approval of the application, but several conditions were proposed.

After two public hearings the preliminary application was approved with minor modifications and with most of the conditions recommended by the referral agencies. The original intervenor thereupon filed its final application. After a comprehensive public hearing, the Commission approved the application without substantial change from its earlier order. Those two orders are the subject of this appeal.

Petitioner's numerous assignments of errors on the final order may be stated briefly as relating to an asserted inadequate notice to it of the second hearing, the deprivation of the right to present evidence and to cross-examine witnesses, insufficient evidence to support several of the Commission's findings, a misapplication of the Planned Unit Development concept and an abuse or stretching of the Commission's authority in permitting the transfer of development rights and using zoning to promote historical preservation. Finding no merit in these, or the other contentions of petitioner, we affirm.

Petitioner asserts that the notice of the nature and extent of the hearing on the final application did not comply with the Commission's own rules or with the Administrative Procedure Act (*see* D.C. Code 1973, § 1-1501 *et seq.*) and that it was thereby deprived of due process of law. The basis of this claim is that the notice did not specify that the final hearing would include the presen-

tation of additional evidence relating to issues that had already been aired at the preliminary stage and that since petitioner's counsel, being under that misapprehension, walked out of the latter hearing it was thereby denied the right to present evidence, to cross-examine, and to file exceptions and present argument concerning the proposed order.

An examination of Zoning Commission Regulation No. 7501.31 regarding the preliminary application and Regulation 7501.39 regarding the final application reveals clearly that it was not intended, nor would it be feasible, to conduct an adequate hearing on the final application without treating, in at least some detail, matters heard on the preliminary application.

Regulation 7501.39 requires in substantial part that the final application shall include the following information: The proposed use, location, dimensions and approximate height of each building, the approximate area and dimension of each lot, the approximate lot occupancy of each building and the approximate floor area ratio of each building, the number and location of all off-street parking spaces, the existing topography of the area and the elevations of the streets and alleys bounding the site, the location of public and private rights of way and easements and the location and approximate number, size and type of stores, offices, residential units and commercial adjuncts together with all maps and documents required for an amendment to these regulations. There is no room for doubt that the hearing on such an application would be detailed and comprehensive. Many of the foregoing matters were, of course, dealt with at the preliminary hearing. It would be both illogical and impractical to conclude that the Commission was precluded from reexamining at the final hearing matters that had been

dealt with on the preliminary application, nor is there any regulation suggesting such a limitation.

Petitioner asserted in its brief on the appeal of the decision approving the preliminary application as set forth in Zoning Commission Order No. 81 that the order was defective in that the Commission's findings of fact and conclusions of law were insufficient as a matter of law. We do not reach that issue since we conclude that the findings of fact and conclusions of law in the final P.U.D. decision (Zoning Commission Order No. 101) are legally adequate and sufficient to support the order approving the application. As long as the petitioner was accorded a due process type hearing whatever deficiencies of the foregoing nature that may have occurred in the preliminary decision were remedied by the final order. The entire record of the preliminary P.U.D. application was incorporated into that of the final application. As the Commission was not precluded from re-examining at the final hearing matters dealt with on the preliminary application, the final order must necessarily control if there is any inconsistency on the merits with the order on the preliminary application.

Two days before the hearing on the final application was to commence the petitioner filed a motion to postpone the hearing pending the decision of this court on the ap-

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[3] This is not inconsistent with our opinion in *Capitol Hill Restoration Society v. Zoning Commission*, D.C.App., 287 A.2d 101 (1972), where we observed at 106 that "defects in the original hearing could not be cured by later proceedings or administrative appeals." That statement related to the sufficiency or legality of the procedures accorded the parties and not to the question of whether on the merits the Board can after the final hearing enter an order that may in some respects differ from or modify the earlier order.

peal of the Commission's decision on the preliminary application. The motion was denied. At the outset of the final hearing counsel for petitioner formally withdrew from participation in that hearing and walked out. On that occasion he said:

> Mr. Addams: I have a preliminary matter. I note that you have denied the motion [filed by Dupont Circle Citizens Association to continue the hearing indefinitely] without argument or rebuttal. I will state for the record that the Dupont Circle Citizens Association will not participate in a hearing on the formalities of a design of how many or what color of stone you are putting on and how big the windows are going to be. We will not participate in a hearing on the design of a building which we feel under the law should not be constructed in the first place.
>
> I would ask the Chairman for guidance at this point, whether it is appropriate to ask for a stay of construction pending the decision of the D.C. Court of Appeals before this body now or should that be done in written form at some subsequent time.
>
> . . .
>
> Mr. Chairman: Mr. Addams, I hope you will recognize that this is done with sincerity rather than any attempt at facetiousness. The fact of the matter is that, first of all, it is true that [applicant's counsel] has made that point in his opposition, and the Commission took that point among others into consideration. *But we are not in a position to advise counsel as to how to proceed, under the circumstances.* [Emphasis added.]

Petitioner received due notice of the final hearing and its counsel was present when the hearing opened. We conclude that the Commission did not err in proceeding with the hearing and in taking evidence which may have, in substantial part, related to matters considered on the preliminary application. Further, petitioner's counsel having voluntarily withdrawn from participation in the hearing, whether with or without actual knowledge of what evidence was to be adduced [4] is in no position now to complain of the scope of that hearing. We can give no serious recognition to the incredulous contention that intervenor's loss of the right to present evidence, to cross-examine witnesses and to make argument was in contravention of the Zoning Rules, the D.C. Administrative Procedure Act, and the due process clause of the Constitution. It was simply the natural and logical consequence of its counsel voluntarily declining to participate.

Similarly petitioner's complaint that a copy of the Commission's proposed findings was not served on it necessarily fails. Rule 2.622 only requires service on "any party who appeared and participated in the hearing . . . ." The petitioner's only designated representative for the hearings, its counsel, was not present and did not participate. Neither of the two members of the petitioner organization (one of whom, a Miss McCarron, was on its executive board) who were present had entered an appearance as a representative of petitioner and there was no showing that either one had authority to act or to speak for it. The petitioner's only duly authorized attorney before the Commission had announced a determination not to participate and absented himself from the final hearing. Further, a reading of the section immediately preceding § 2.622 and the section immediately following it would indicate that the rule was designed to apply to a hearing conducted by a hearing officer, not to a hearing before the Commission.

[4] Section 2.4 of the Zoning Rules of Practice and Procedure (Title 20 DCRR) requires the applicant to file ten days before the hearing is advertised, among other things, a list of witnesses, maps, plans and other documents to be offered at the hearing. In the instant case they were filed on August 15, a week before the hearing was advertised on August 23, and a full month and a half before the hearing was held on October 2, together with an outline of what each witness would testify about. Petitioner is presumed to have known of that requirement, although the rules do not require that these papers be served on other parties since the other parties are not determined until 5 days prior to the hearing. (*See* 20 DCRR § 2.44.)

Petitioner complains that the Commission failed to comply with rule 2.623 regarding service of proposed findings and conclusions on each party. That rule is inapposite to this situation and was designed only to apply to hearings "wherein a majority of the Commissioners did not personally hear the evidence." A majority of three Commissioners heard all of the evidence at the hearing on the final application. All three participated and voted at the meeting when unanimous approval of all five Commissioners was given the application. The fact that only two of those three and one of the other Commissioners signed the findings of fact and conclusions is irrelevant to rule 2.623.[5]

In a similar vein, petitioner also asserts that the failure of the intervenor to serve it with a copy of intervenor's proposed findings and conclusions denied it rights under § 1.6 of Title 20 DCRR as well as rights of due

[5] For the same reasons there was no breach of D.C. Code 1973, § 1-1509(d) as contended by petitioner since a majority of those who were to render the final order personally heard the evidence.

process. Section 1.64 provides that "[a]ny paper *required to be served upon a party* shall be served upon him . . . ." [Emphasis supplied.] However, we are unable to find anything in Title 20 of the D.C. Rules and Regulations requiring the proposed findings to be served upon other parties. Section 2.56 which deals with proposed findings states that "[p]arties . . . shall submit proposed findings of fact and conclusions of law *for the consideration of the Commission* . . . ." [Emphasis supplied.] The drafters of Title 20 clearly expressed their intention that the proposed findings be submitted to the Commission but did not provide for them to be served on other parties. This is consistent with the failure of the Commission to provide by rule for a party to file objections or exceptions to the proposed findings of the opposing party. We know of no authority supporting petitioner's contention that the failure of intervenor to serve it with proposed findings denied it due process of law. Such a position is particularly untenable when raised by a party that announced its refusal to participate at the inception of the hearing.

Petitioner also asserts that it was denied the right to cross-examine witnesses when, in the absence of its counsel the Commission refused the request of Miss McCarron, a member of its executive board and a nearby property owner, to cross-examine a witness of the applicant. As we have observed, however, Miss McCarron had not entered an appearance and therefore did not have a personal right to cross-examination as would a party to the proceedings. Neither was there any foundation laid for her to act as counsel or to speak on behalf of the Dupont Circle Citizens Association. Since that party's only counsel of record had announced its decision not to participate the Commission certainly had no authority to

permit a single member of the executive board to overrule that decision and it properly denied the request.

It is further contended by petitioner that the Zoning Act and Regulations do not permit the Commission to approve a transfer of development rights within a P.U.D. As petitioner provides us with no legal support for its position, we turn to an examination of the Act which grants the Commission a broad general authority in the following language:

> To promote the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia and its planning and orderly development as the national capital, the Zoning Commission created by section 5-412, is hereby empowered, in accordance with the conditions and procedures specified in sections 5-413 to 5-428, to regulate the location, height, bulk, number of stories and size of buildings and other structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the uses of buildings, structures, and land for trade, industry, residence, recreation, public activities, or other purposes . . . . [§ 5-413.]

The Act further provides in the next section:

> Such regulations shall be . . . designed to lessen congestion in the street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create condi-

> tions favorable to health, safety, transportation, prosperity, protection of property, civic activity and recreational, educational, and cultural opportunities . . . . [§ 5-414.]

This grant of authority is not materially unlike the first three sections of the Standard State Zoning Enabling Act, drafted and distributed by the United States Department of Commerce in the early 1920's.* It represents a broad grant of authority with an itemization of the main purposes of zoning.

We turn now to a consideration of petitioner's claim that the Zoning *Regulations* do not provide for the transfer of development rights. The very nature of the Planned Unit Development concept as promulgated by the Zoning Commission in Article 75 of the Regulations suggests that a transfer of development rights from one building to another must have been contemplated as one that was both feasible and appropriate in the development of such a plan. Regulation 7501.39 provides that the lots within a P.U.D. may be of different sizes, the buildings of different heights and that the lot occupancy of the building may vary on each lot. It is not surprising then that the Commission provided in 7501.24b that "[t]he floor area of all buildings shall not exceed the *aggregate* of the floor area ratios as permitted in the several districts included within the project area . . . ." [Emphasis supplied.] This is consistent with, and we take it to be an official recognition of, the utility of the development rights concept to a P.U.D. On the other hand, there is no provision in P.U.D. regulations that the floor area ratio of each building in the P.U.D. must be within the maximum permitted in the district. The

* *See* 4 R. ANDERSON, AMERICAN LAW OF ZONING § 26.01 (1968); 1 *id.* §§ 3.11-3.14.

requirement to be met is that the F.A.R. for all buildings does not exceed the "aggregate" permitted within the project area. The Commission has found that the proposed project meets that requirement and we know of no good reason why, in making that determination, it may not take into consideration a mutually agreed upon transfer of development rights. We also hold that where the total F.A.R. for the project is the determinative figure, rather than the F.A.R. for each building, there is no impediment to permitting payment for the transfer of such rights from one building owner to another within the same project when agreed to by the parties.

Petitioner also questions the Commission's use of zoning to accomplish historical preservation contending that it is unauthorized by the Code. It does not deny that Congress has passed a number of statutes supporting historical preservation, but contends that since Congress has not specifically authorized it in the Zoning Act the Commission is without authority to use zoning for that purpose. We cannot agree. The quotation, *supra*, from the Zoning Act authorizes the Commission among other things to conduct zoning so as to promote the "general welfare of the District of Columbia and its planning and orderly development as the national capital." (D.C. Code 1973, § 5-413.)

In the case of *Rebman v. City of Springfield*, 250 N.E.2d 282 (Ill. App. 1969), an Illinois appellate court observed that "preservation of historical areas under reasonable limitations as to use is within the concept of public welfare and may be affected by the exercise of the usual police power attendant upon zoning." 250 N.E.2d at 288.

During the past one hundred years, at least, there has been considerable thrust behind the movement for his-

torical preservation as demonstrated by the activities of private organizations and of the federal and state governments. Every state, the federal government, and over 40 municipalities have enacted various forms of historic preservation laws.[7]

When the Congress enacted the Historic Sites, Buildings and Antiques Act of 1935 it declared that "it is a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. § 461 (1970). That objective was restated and given further implementation by the Historic Properties Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915, wherein Congress found and declared:

. . .

> (b) that the historical and cultural foundations of the Nation should be preserved . . .
>
> . . .
>
> (d) that, although the major burdens of historic preservation have been borne . . . by private agencies and individuals, . . . it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities . . . and to assist State and local governments . . . to expand and accelerate their historic preservation programs and activities. [16 U.S.C. § 470 (1970).]

The National Trust for Historic Preservation, established by Congress to lead the historic preservation movement (16 U.S.C. 468 (1970)) requested, by letter to the Zoning Commission of April 20, 1973, permission to ap-

[7] *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963).

pear and testify in support of the preliminary application. In its letter the Trust stated: "The proposed zoning change will result in the transfer of the unused development rights over an historic building (the Heurich Mansion) to land adjacent to the site of the historic building. Such a technique can result in historic buildings being saved where economic pressures ordinarily would result in their demolition."

The National Capital Planning Commission in a letter of May 31, 1972, to the Zoning Commission stated in reference to conditions it was imposing that "[t]he interest of the Commission is the preservation of the Heurich Mansion . . . ."

In its final report the Zoning Advisory Council in recommending approval of the application said: "The preservation and upkeep of a category II Landmark (the Heurich Mansion) on the National Register of Historic Places is in the best interests of the District of Columbia."

The general Congressional intent to preserve places and areas of historic interest was made mandatory by Congress as to zoning in the district of "Old Georgetown" when Congress provided: "In order to promote the general welfare and to preserve and protect the places and areas of historic interest, exterior architectural features and examples of the type of architecture used in the National Capital in its initial years" the Commission shall solicit a report from the National Commission on Fine Arts before issuing a building permit in the Georgetown district. D.C. Code 1973, § 5-802.

In that law the Congress observed that this was being done "to promote the general welfare." *Id.* It would be in derogation of the Congressional intent so clearly ex-

pressed to hold that although the Zoning Commission is under a mandate to consider matters of historic preservation in a particular district that it is without authority even to give consideration to that factor when the property is located in another area. The instant P.U.D. is located less than four blocks from the "Old Georgetown" district. We conclude that the Commission was acting in the interests of "the general welfare" and within its authority when it gave consideration to historical preservation in weighing the transfer and sale of development rights and the merits of the P.U.D.

Petitioner further alleges that the regulations contained in Article 75 of the D.C. Zoning Regulations dealing with Planned Unit Developments violate the uniformity provisions of § 5-413 of the D.C. Zoning Act.* It asserts that this section of the Act imposes a requirement of uniformity within each zoning district which is not met by the P.U.D. regulations which permit "diversification in the use, size, type and location of buildings" and that consequently the regulations do not conform to the Zoning Act. We fail to discern that the regulations run contrary to the Act in the manner described by petitioner.

We have found no authority, and petitioner refers us to none, supporting its proposition. The interpretation of the uniformity requirement of the Zoning Act is of first impression in the District of Columbia. Other courts which have dealt with the matter have uniformly found that P.U.D. and P.U.D.-type regulations do not violate

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*The uniformity provision of the Zoning Act (D.C. Code 1973, § 5-413) provides:

> All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts.

uniformity requirements. The California Court of Appeal was faced with a uniformity provision virtually identical to ours in *Orinda Homeowners Committee v. Board of Supervisors*, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1st Dist. 1970). In that case the court held that the uniformity provision

> provides that the *regulations* shall be uniform for each class or kind of building or use of land throughout the zone. It does not state that the units must be alike even as to their character . . . . In conventional zoning, where apartment houses are permitted in a particular zone, single family dwellings, being regarded (whether rightly or wrongly) as a "higher" use, are also allowed. This causes no conflict with [the uniformity provision]. [90 Cal. Rptr. at 90-91.]

Thus according to the California court Planned Unit Developments do not violate such a provision.

That court went on to examine the history of the uniformity provision noting that it was derived from Section 2 of the Standard State Zoning Enabling Act and

> it is said in 1 Anderson, American Law of Zoning, § 5.17, p. 288, that the purpose of [that] section was mainly a political rather than a legal one, namely, to give notice to property owners that there shall be no improper discriminations. This was useful in the early days of zoning. Professor Anderson suggests that the fact that the section is an expression of policy may be the reason for the scarcity of judicial construction of the uniformity requirement. [90 Cal. Rptr. at 91.]

The Supreme Court of Pennsylvania, in upholding an amendment to the zoning map so as to permit the locat-

ing of a P.U.D. in a low density residential district held "that the board, within its sound discretion, could have concluded that council passed the ordinances with the proper overall considerations in mind. The P.U.D. district established by ordinance 160 is not the type of use which by its very nature could have no place in the middle of a predominantly residential borough." Included in the new district were single family attached, or detached dwellings, apartments, parks, a municipal building, a school, art galleries, professional offices, motels, etc.[9]

We find the reasoning in those two cases to be persuasive and hold that Article 75 of the D.C. Zoning Regulations does not violate D.C. Code 1973, § 5-413 and was not beyond the authority of the Commission. The Act requires only that the regulations be applied uniformly to all property throughout a district, all owners of the same class being treated alike. The uniformity provision does not prohibit a classification which is reasonable. 1 R. ANDERSON, *supra* at § 3.13 and § 5.17.

Petitioner asserts, however, that even if this be true, that the option of utilizing the benefits and flexibilities of the Article 75 regulations are not open on the same basis to all property owners and thus there is created an "invidious discrimination based on wealth, in violation of the equal protection and due process clauses" of the Constitution.[10]

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[9] *Cheney v. Village 2 at New Hope, Inc.*, 241 A.2d 81, 84-85 (Pa. 1968).

[10] As we have stated on many occasions, most recently in *Kelly v. United States*, D.C.App., 348 A.2d 884 (1975), the 14th Amendment (and hence the equal protection clause) does not apply to the District of Columbia. However, equal protection and due process are not mutually exclusive terms

We find this essentially to be a frivolous argument. Nowhere in Article 75 of the Zoning Regulations is there any provision which would indicate that the option to develop Planned Unit Developments is not open to all property owners within the respective zoning districts. Naturally, this does not guarantee that all owners will be able to achieve the same flexibility of development regardless of the type and location of the property they own. The nature of development on different parcels of land depends on the location and character of the property and the character and quality of the proposed development and is for the Zoning Commission not this court to decide.

Petitioner asserts that "only large landowners and developers can take advantage of the P.U.D. regulation, because only large, one-acre-or-more tracts are eligible . . . ." That this argument is specious can be seen from an examination of the fact situation of the instant case. Here four property owners came together to put forth a P.U.D. proposal. None could have done so by itself since none owned an "acre or more". There is nothing to prevent any number of owners from doing exactly what was done here, other factors being equal. Indeed, the P.U.D. regulations seem designed to achieve just such a result.

Petitioner's claim that the due process clause is violated by Article 75 since its implementation "requires involved, time-consuming and necessarily expensive administrative procedures requiring extensive services of attorneys, architects and planners", rests on no stronger

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and, as the Supreme Court has said, many of the concepts in the equal protection clause are applicable to the District through the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). *See also Washington v. United States*, 130 U.S.App.D.C. 374, 401 F.2d 915 (1968).

footing. Such assertions might be made against many zoning regulations whether they concern a complicated Planned Unit Development, a map change, a street closing or a mere zoning variance.

A zoning ordinance is presumed valid and the burden of proof rests upon the litigant who asserts its unconstitutionality. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.15 n.6 (1968). The determinative issue is whether the ordinance is a reasonable exercise of the police power. *Id.* § 2.19. Petitioner here has not demonstrated unreasonableness in the ordinance. Considering the benefit to the neighborhood as found by the Commission, we find the application of Article 75 to be a reasonable exercise of the Commission's authority. For a more detailed discussion of the problem supporting this result *see* Annot., 43 A.L.R.3d 888 (1972).

As to the assignments of error directed at those portions of the findings and conclusions that bear upon the merits of the application we first observe that our function is not to determine whether a particular zoning action is, or is not desirable.[11] Rather it is to determine whether there were any errors of law in the proceedings, whether the findings and conclusions were arbitrary, capricious or an abuse of discretion, or not supported by substantial evidence.[12]

The Zoning Commission sought guidance from the many government agencies concerned with the enterprise and the area, each of which urged approval of the P.U.D. Opposing witnesses and parties were given ample opportunity to be heard.

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[11] *Berman v. Parker*, 348 U.S. 26, 33 (1954).

[12] D.C. Code 1973, § 1-1510. *See also* D.C. Code 1973, § 17-305(b).

We have examined the record and conclude that there was substantial evidence to support the decision of the Commission. The Commission is the authority charged by Congress with interpreting and enforcing the zoning laws and regulations of the District of Columbia. As long as its proceedings were according to law, its decisions will carry a presumption of regularity on appeal and this court will not weigh the evidence and substitute its judgment for that of the Commission.[13]

Finding the other contentions of petitioner to be without merit, the orders appealed from are

Affirmed.

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[13] *Brawner Building, Inc. v. Shehyn*, 143 U.S.App.D.C. 125, 130, 442 F.2d 847, 852 (1971); *Salyer v. McLaughlin*, 100 U.S.App.D.C. 29, 31, 240 F.2d 891, 893 (1957); *Lewis v. District of Columbia*, 89 U.S.App.D.C. 72, 74, 190 F.2d 25, 27 (1951); 3 R. ANDERSON, AMERICAN LAW OF ZONING § 21.16 (1968).

APPENDIX C

GOVERNMENT OF THE DISTRICT OF COLUMBIA
ZONING COMMISSION
District of Columbia

ZONING COMMISSION ORDER NO. 101
CASE NO. 74-10/71-30F
December 13, 1974

Pursuant to a notice, a public hearing of the Zoning Commission was held on October 2, 1974, to consider the final application for a planned unit development and related zone change, filed by the Dupont Circle Joint Venture.

FINDINGS OF FACT

1. The site of the proposed planned unit development is located on the south side of Dupont Circle in the block bounded by Dupont Cirle, 19th Street, Sunderland Place, and New Hampshire Avenue, N.W., in Square 115, lots 31-47, 50-56, 79, 81-82, and 822.

2. The area of the subject site is approximately 66,854 square feet (Baist Atlas Vol. 1, Page 6).

3. A portion of the subject site is presently zone C-3-B (High bulk major business and employment center — floor area ratio of 6.5 and 90 feet height limit, residential use limited to floor area ratio of 4.5 and percentage of lot occupancy of 75) at the northern tip of the site occupied by the Euram Building, which faces directly onto Dupont Circle. The remainder of the site is presently zoned SP (Office-floor area ratio of 5.5, height limit of 90 feet).

4. The related zone change filed with this final application for a planned unit development, requests that the

portion of the subject site presently zoned SP be changed to C-3-B.

5. This final application proposes the construction of a 12 story office building to a height of 130 feet with roof structures extending above that level, with retail space on the first floor and part of the first cellar, and parking at four below-grade levels.

6. The gross floor area of the proposed building would be 301,433 square feet. Approximatley 82,000 square feet of the total would be from a transfer from the Columbia Historical Society.

7. The most significant feature of this planned unit development is the proposal to transfer unused density from an existing building on the site, the Christian Heurich Mansion owned by the Columbia Historical Society, to the proposed 12 story office building to be built in the center of the site. The applicant has contracted to purchase said 82,000 square feet of unused development rights to be used in the construction of the proposed building.

8. The Columbia Historical Society property currently contains 15,695 square feet of gross floor area (approximately a floor area ratio of 0.9) in the Heurich Mansion and Carriage House. Under the present SP zoning a total of 95,590 square feet could be developed on the Society's property. If the requested zone change to C-3-B is granted, a total of 112,870 square feet could be developed by the Society. The property owned by the Society would thus have an unused development potential of approximately 97,175 square feet.

9. The subject site is located in the Dupont Circle section of the District. Within the site two new structures, the Euram and Sunderland Buildings, have been constructed within the recent past. Other buildings adjacent to Dupont

Circle and the site have been recently completed. This construction has included office buildings and apartment houses. The general area is of a mixed character, including large amounts of residential space as well as retail and employment facilities. One of the most important visual aspects of the area adjacent to the site is Dupont Circle itself. Five streets lead into the Circle from ten different directions. These streets break into the facade of the Circle. There are presently eleven building facades facing on the Circle. Of these, seven are approximately 40 feet or less in height, while the remaining four are appproximately 90 feet or greater in height.

10. Immediately across 19th Street from the subject site is the Dupont Circle Building, an office building constructed prior to 1958, which rises to 130 feet and exceeds the maximum allowable FAR in the C-3-B zone district. The site is and will be accessible by mass transit. Numerous metro bus routes use Connecticut Avenue, Massachusetts Avenue, P Street, 19th Street, and 20th Street. The Dupont Circle station of the Rockville Metro route will be constructed to serve the area containing the site. The entrance to the south end of the station will be located on the east side of 19th Street immediately across the street from the site.

11. Existing zoning in the area is a combination of high density districts, including C-3-B, SP, and C-2-B. As aforesaid, the east side of 19th Street immediately across from the site is zoned C-3-B, but developed with a building approximately conforming to specifications of the C-4 zone district. The northwest side of New Hampshire Avenue is zoned C-3-B. The third side of the site is bordered by SP zoning. The C-3-B zone district currently extends approximately three-quarters of the way around Dupont Circle.

12. The Zoning Advisory Council concluded, and the Commission finds, that the proposal as presented does not reflect any substantial change from the preliminary application and that the design of the new building is in conformance with the Zoning Commission preliminary approval contained in Zoning Commission Order No. 81 (TR II pg. 8).

13. The Zoning Advisory Council concluded, and the Commission finds, that a modification allowing vehicular access relocated from New Hampshire Avenue to 19th Street would not adversely affect pedestrian circulation (TR II pg. 8). The Zoning Advisory Council recommended that no transfer of development rights from the site currently occupied by the Sunderland Building should be allowed.

14. The Zoning Advisory Council concurred in the staff report and recommended that the specific conditions therein, as hereinafter discussed, should be contained in the approval of the said planned unit development. The Zoning Advisory Council concluded, and the Commission finds, that this application for final approval of the planned unit development and for change of zoning from SP to C-3-B is in harmony with the intent and purposes of the Zoning Regulations and Map (TR II pp. 8-9).

15. The Office of Planning and Management concluded, and the Commission finds, that the final application is in conformance with the guidelines and standards set out by the Zoning Commission in Order No. 81 granting preliminary approval of the planned unit development, the proposed building is consistent with the intent and purposes of the Zoning Regulations and Map, the proposal is consistent with Section 7501 of the Zoning Regulations and the scale and architectural design is compatible with development in the surrounding area (TR II pp. 12-13).

16. The Office of Planning and Management concluded, and the Commission finds, that no transfer of development

rights from the site currently occupied by the Sunderland Building should be allowed, since there was no mention of this proposal in the preliminary application (TR II pg. 13).

17. The Office of Planning and Management recommended approval of the zone change from SP to C-3-B and approval of the final application for a planned unit development subject to the conditions specified in Order No. 81 and certain conditions set forth in the staff report (exhibit 2, public hearing of October 2, 1974).

18. The National Trust for Historic Preservation recommended approval of the planned unit development which would allow the transfer of development rights from the Heurich Mansion, assuring preservations of its historic and architectural significance (TR II pg. 16).

19. The applicant asked that the application be amended to delete the request for transfer of development rights from the Sunderland Building, and the request was accepted by the Commission (TR II pg. 18).

20. The exclusive record in the prior hearing on the preliminary application was incorporated in its entirety by reference into the record of the hearing on the final application (TR II pg. 37).

21. The Columbia Historical Society is in need of financial assistance to continue to operate and preserve the Heurich Mansion and surrounding property. (TR I pp. 212-213). The increased costs of maintenance and upkeep as well as necessary repairs have made it increasingly difficult for the Society to justify from an economic standpoint the retention of the building (TR I pp. 71, 122, 169, 201, 202, 205, 212, 213, 215). Although the Society is not in financial debt at this time, additional funds are necessary to cover the costs of needed maintenance and repairs which will be required if the building and grounds are to continue to operate and be open to the public (TR II pg. 34).

22. The proposed sale of the development rights for the property owned by the Columbia Historical Society is necessary in order to raise the funds required to enable the Society to continue to maintain the historic mansion and surrounding property. The transfer of development rights concept is a recognized means of preserving urban landmarks (TR II pp. 15-16). Sale of the development rights by the Columbia Historical Society will assure preservation of the Heurich Mansion and its surrounding property (TR II pp. 16, 26, 28, 50, 52), (TR I pp 36-37, 71, 101, 131, 147, 439). The sale of development rights will assure the preservation of the Heurich Mansion for two reasons: (1) it will provide the necessary funds to operate and repair the property and (2) it will reduce the economic feasibility of ever selling the property because the development on said property will be permanently reduced to that permitted under the existing zoning minus the development rights sold to the Dupont Circle Joint Venture (TR I pg. 91). Historic preservation ordinances are limited in their ability to preserve historic landmarks because of constitutional restrictions on the taking of property (TR I pp. 36-37, 153-155). The transfer of development rights is an effective means of preserving the Heurich Mansion as an historic landmark (TR I pg. 147), (TR II pg. 16).

23. The proposed building will enhance the working environment in the Dupont Circle area. The new zoning will no longer restrict office uses to nonprofit organizations and/or professionals (TR II pg. 7). The construction of an office building whose design and appearance is compatible with existing buildings is consistent with the needs and desires of the abutting property owners (TR II pp. 25-26, 38). The proposed building will provide a shop lined two story arcade through the building (TR II pg. 28). The building will provide a concentration of employment and retail space in close proximity to a Metro station and other employment areas and will therefore encourage the use of

mass transit (TR I pp. 234-235, 304). The building's design provides for a 90 foot set back from Sunderland Place, open space, the preservation of the Heurich Mansion and will be free standing thereby providing an attractive facade on all four sides and the maximum window area for light, air, and views (TR I pp. 233-234, 275), (TR II pp. 19, 27-28).

25. The architecture and design of the new building will borhood. The overall density in the square will be below that which is permitted by right under existing zoning (TR II pg. 21). The scale and architectural design of the building is compatible with the development in the surrounding area (TR II pg. 13). The new building will promote better land utilization by replacing an open parking lot which is the source of visual, noise, and air pollution with a new building which complements the balance of the square (TR II pg. 21, (TR I pp. 240, 303, 233).

23. The architecture and design of the new building will provide open space and will be in harmony with the other buildings in the block (TR I pp. 233-234, 275), (TR II pg. 27). The new building will provide for the preservation of an historic landmark and a garden and open space which will greatly enhance the neighborhood (TR II pp. 27-28). The building will also provide an arcade with shops which will encourage pedestrian activity in the evening close to a Metro stop and promote the safety of those persons going to and from Metro (TR I pg. 235). There will be an interesting paving and planting of the arcaded area which will provide a pleasant walk through the building to Metro (TR I pg. 278).

26. In the proposed building, cars will be parked in an underground garage properly ventilated with filtered air exhausted to the outside and noise problems eliminated (TR I pg. 276). The use of all electric heating-cooling systems will eliminate the use of burners and burning fuels, such as oil (TR I pp. 277, 283).

27. The new building provides for a direct pedestrian connection across 19th Street at street level to the Dupont Circle Metro Station. 19th Street is only 31 feet in width and is a well controlled cross way. It is neither necessary nor desirable to provide an elevated cross walk to the Metro stations as this would require pedestrians to ascend or descend stairs at either side of the road way (TR I pp. 278, 64).

28. There is no maximum limitation on the number of parking spaces under the Zoning Regulations. Property owners may as a matter of right provide any number of parking spaces in excess of the legal minimum. In this case, the applicant originally proposed 445 parking spaces well above the legal requirement and permitted under the Zoning Regulations (TR I pg. 276).

29. Under any Article 75 PUD, the Zoning Commission has the authority to specify the number of parking spaces and because of the proximity to Metro, in this case required, the reduction of parking spaces to 160 which is the number proposed in this final application (TR II pg. 41). In terms of the number of parking spaces, the 160 spaces now proposed is approximately 40 less than the number of spaces now existing on the surface parking lot on the property. By providing fewer spaces, there will be no increase in the traffic flow (TR II pg. 41).

30. Lelia J. Smith, representing Don't Tear It Down, Inc., supported the application stating that this means of development would save a structure of landmark quality and would not necessarily detract from the immediately adjacent area.

31. Mr. Nicholas J. Addams, representing the Dupont Circle Citizens Association, a party in opposition to this application, stated that the Association "would not par-

ticipate in a hearing on the design of a building which we feel under the law should not be constructed in the first place" (TR. 5).

32. There was opposition to the final application for a planned unit development and related zone change from Harriett B. Hubbard and Catherine McCarron (TR. 54-72).

CONCLUSIONS OF LAW

1. The planned unit development process is an appropriate means of controlling the development of the subject site.

2. The additional floor area ratio, created pursuant to the Zoning Regulations when property is included in a planned unit development, can legally be allocated to any property in the planned unit development.

3. This final application is appropriate, taking the present character of the area into consideration, because it would encourage stability of the area and the land values therein.

4. The approval of this final application is in harmony with the intent, purpose and integrity of the comprehensive zone plan of the District of Columbia as embodied in the Zoning Regulations and Map.

5. The final approval of this preliminary application for a planned unit development is in accordance with the Zoning Regulations of the District of Columbia, as amended, and the Zoning Act (Act of June 20, 1938, 52 Stat. 797), as amended.

6. The approval of the related zone change from SP to C-3-B would not adversely affect the character and use of adjacent or neighboring districts.

7. The approval of the zone change from SP to C-3-B is in harmony with the intent, purpose and integrity of the comprehensive zoning plan as embodied in the Zoning Regulations and Map.

DECISION

While the proposed FAR of the new building to be built in the middle of the site was 7.0, the effective FAR of the proposed building due to a concentration of density would have been 9.79. By reducing the overall FAR of the site to 6.5, the effective FAR of the proposed building is reduced to 8.9. The lessening of height and bulk of the proposed building will decrease its visual impact on the immediately adjacent historic landmark, the Heurich Mansion, and will provide a less abrupt height and bulk differential between the new building and buildings in the immediate area including the Euram and Sunderland Buildings.

Upon consideration of the findings of fact and conclusions of law herein, the Zoning Commission ORDERS APPROVAL of said final application for a planned unit development and related zone change, subject to the elements, conditions, and guidelines hereinafter set forth:

1. Change from SP to C-3-B, lots 79, 81, 822, 39-47, 50-56, in Square 115, bounded by New Hampshire Avenue, Sunderland Pl., and 19th Street, N.W.

2. The property shall be developed with no more than five separate buildings. The existing Euram and Sunderland Buildings shall not be increased or decreased in terms of gross floor area, provided that certain minor modifications may be made to the Sunderland Building, as shown on Exhibit 7 A, B, C & D of the public hearing.

3. The existing Heurich Mansion, Carriage House and garden shall be preserved. Additional construction on that site for a library and/or auditorium, not to exceed a total of 15,275 square feet of gross floor area, may be approved, but only if the property owner applies to the Zoning Commission for an amendment to the approved Planned Unit Development.

4. The overall FAR for the entire Planned Unit Development shall not exceed 6.5.

5. The new building shall include 82,000 square feet of gross floor area transferred from the Columbia Historical Society property.

6. The new building shall not exceed 130 feet in height. Any roof structures in the excess of that limit, as normally permitted by the Regulations, shall not exceed 17 feet in height.

7. The new building shall be devoted to any uses permitted in the C-3-B district, provided that the ground floor and one half of the first cellar shall be devoted to retail commercial uses, provided further than such retail uses shall not include banks.

8. Parking shall be provided at the rate of one space per 2,000 square feet of gross floor area.

9. A convenient and secure parking area for 25 bicycles shall be provided on the ground level or first cellar level.

10. Vehicular access to the new building shall be from 19th Street, N.W., and shall be restricted to one point.

11. The final design shall contain a pedestrian passage through or around the new building from New Hampshire Avenue to 19th Street. The area of such pedestrian passage will not be included in the calculation of FAR permitted on the site. Such passage shall be fronted on by and contain entrances to the retail establishments referred to in item no. 7 above.

12. The landscaping of said Planned Unit Development shall be as set forth on Sheet No. A-2, dated May 15, 1974, and the accompanying schedule of planting as submitted by the applicant.

13. All provisions contained in the Proposed Conditions Relating to Preservation of Christian Heurich Memorial Mansion, Carriage House and Grounds, annexed hereto as Attachment Number I, are by this reference made part of this final approval of the Planned Unit Development. Said conditions for preservation shall run with the land.

14. The final design of the building shall be based primarily on the plans submitted with this final application and designated as follows:

    Titled:

    Proposed Twelve Story Office Building

1333 New Hampshire Avenue, N.W.
Washington, D.C.
Architect: Vlastimil Koubek, AIA
Sheets dated May 15, 1974, A-1 through A-12

15. Approval of the application by this Commission and Board of Zoning Adjustment shall not relieve the applicant of the responsibility of conforming to all other applicable codes and ordinances of the District of Columbia.

16. The change of zoning shall not be effective until the recordation of the covenant required by subsection 7501.2 to include conditions for the preservation of the Heurich Mansion and Carriage House and completion of the Planned Unit Development process.

17. The applicants shall submit the stages and schedule of development with the application for further processing before the Board of Zoning Adjustment.

/s/ John A. Nevius
JOHN A. NEVIUS

WALTER E. WASHINGTON

/s/ George M. White
GEORGE M. WHITE

/s/ Richard L. Stanton
RICHARD L. STANTON

ATTEST: /s/ Martin Klauber
Martin Klauber
Executive Secretary

APPENDIX D

GOVERNMENT OF THE DISTRICT OF COLUMBIA
ZONING COMMISSION
District of Columbia

ZONING COMMISSION ORDER NO. 81
CASE NO. 71-30
February 1, 1974

Pursuant to notice, a public hearing of the Zoning Commission was held on April 25 and June 21, 1973, to consider the preliminary application for a planned unit development and related zone change, filed by the Dupont Circle Joint Venture.

FINDINGS OF FACT

1. The site of the proposed planned unit development is located on the south side of Dupont Circle in the block bounded by Dupont Circle, 19th Street, Sunderland Place and New Hampshire Avenue, N.W., in Square 115, Lots 31-47, 50-56, 79, 81-82 and 822.

2. The area of the subject site is approximately 66,715 square feet (Baist Atlas Vol. 1, Page 6).

3. A portion of the subject site is presently zoned C-3-B (High bulk major business and employment center — floor area ratio of 6.5 and 90 feet height limit, residential use limited to floor area ratio of 4.5 and percentage of lot occupancy of 75) at the northern tip of the site occupied by the Euram Building, which faces directly onto Dupont Circle, the remainder of the site is presently zoned SP (Office-floor area ratio of 5.5, height and limit of 90 feet).

4. The related zone change filed with this preliminary application for a planned unit development requests that

the portion of the subject site presently zoned SP be changed to C-3-B.

5. This preliminary application proposes the construction of a 12-story office building to a height of 130 feet with roof structures extending above that level, with retail space on the first floor and part of the first cellar, and parking for 428 at four below-grade levels.

6. The most significant feature of this preliminary application is the proposal to transfer unused density from 2 existing buildings on the site to the proposed 12-story office building at the center of the site. The applicant has contracted to purchase 90,000 square feet (approximately 5.18 FAR) from the Columbia Historical Society and 4,218 square feet (0.5 FAR) from the owners of the Euram Building. These unused development rights totalling approximately 94,218 square feet would be utilized in the construction of the proposed building.

7. The Columbia Historical Society property currently contains 15,695 square feet of gross floor area (approximately a floor area ratio of 0.9) in the Heurich Mansion and Carriage House. Under the present SP zoning a total of 95,590 square feet could be developed on the Society's property. If the requested zone change to C-3-B is granted, a total of 121,660 square feet could be developed by the Society. The property owned by the Society would thus have an unused development potential of approximately 108,874 square feet.

8. The Euram Building, located at the northern corner of the triangular site, was built to the maximum floor area ratio permitted as a matter of right in the C-3-B zone district. However, the inclusion of the Euram site within the area of the proposed planned unit development makes it eligible for a possible additional 0.5 FAR, and it is proposed that this additional unused development potential of 4,218 square feet created through the planned unit development process be sold to the Joint Venture.

9. The subject site is located in the Dupont Circle section of the District. Within the site two new structures, the Euram and Sunderland Buildings, have been constructed within the recent past. Other buildings adjacent to Dupont Circle and the site have been recently completed. This construction has included office buildings and apartment houses. The general area is of a mixed character, including large amounts of residential space as well as retail and employment facilities. One of the most important visual aspects of the area adjacent to the site is Dupont Circle itself. Five streets lead into the Circle from ten different directions, these streets break into the facade of the Circle. There are presently eleven building facades facing the Circle. Of these, seven are approximately 40 feet or less in height, while the remaining four are approximately 90 feet or greater in height.

10. Immediately across 19th Street from the subject site is the Dupont Circle Building, an office building constructed prior to 1958, which rises to 130 feet and exceeds the maximum allowable FAR in the C-3-B zone district. The site is and will be accessible by mass transit. Presently numerous metro bus routes use Connecticut Avenue, Massachusetts Avenue, and P Street, 19th Street and 20th Street. The Dupont Circle station of the Rockville Metro route will be constructed to serve the area containing the site. The entrance to the south end of the station will be located on the east side of 19th Street immediately across the street from the site.

11. Existing zoning in the area is a combination of high density districts, including C-3-B, SP and C-2-B. As aforesaid, the east side of 19th Street immediately around from the site is zoned C-3-B, but developed with a building

conforming to specifications of the C-4 zone district. The north side of New Hampshire Avenue is zoned C-3-B. The third side of the site is bordered by SP zoning. The C-3-B zone district currently extends approximately three-quarters of the way around Dupont Circle.

12. There have been numerous applications in the general vicinity of the subject site made to this Commission. Applications before this Commission for the square within which the subject property is located and immediately abutting squares are as follows:

a. Square 114 (immediately across New Hampshire Avenue from the subject property): application for change of zone from SP to C-3B: Case No. 64-90, denied without a hearing, December 15, 1964.

b. Square 114 (immediately across New Hampshire Avenue from the subject property): application for change of zone from SP to C-3-B: Case No. 65-10, denied without a hearing, February 2, 1965.

c. Square 114 (immediately across New Hampshire Avenue from the subject property): application for change of zone from SP to C-3-B: Case No. 66-19, approved October 4, 1966.

d. Square 115 (part of the subject property): application for change of zone from SP to C-3-B: Case No. 67-64, denied January 15, 1968.

e. Square 116 (south of the subject property): application for change of zone from SP to C-3-B: Case No. 68-59, denied, December 16, 1968.

13. There have also been numerous applications before the Board of Zoning Adjustment in the squares in this general area. These applications fall generally into three classes: requests for permission to establish or continue a parking lot; requests for approval of roof structures to construct new buildings; requests for permission to include certain uses within the SP zone district. Some of the more recent significant cases involving the site include:

a. Square 115 (part of the subject property): request for permission to occupy part of an SP office building with a nonprofit family foundation: Case No. 10287, withdrawn after public hearing, January 20, 1970.

b. Square 115 (part of the subject property): request for permission to occupy part of an SP building with an art gallery: Case No. 10171, withdrawn after public hearing, December 16, 1969.

c. Square 115 (part of the subject property): request for a variance of the use provisions to allow a restaurant in the SP District, Case No. 10981, denied September 21, 1971.

14. The Zoning Advisory Council found that the preservation and upkeep of a Category II Landmark, the Heurich Mansion, owned by the Columbia Historical Society, listed in the National Register of Historical Places, was in the best interest of the District of Columbia, and that the transfer sale of density from the Columbia Historical Society property to the Dupont Circle Joint Venture property was an appropriate method for accomplishing said preservation (TR. 37).

15. The Zoning Advisory Council recommended approval of the preliminary application for a planned unit

development but recommended against allowing the transfer of density, created by the planned unit development procedure from the site occupied by the Euram Building to the proposed building, since no public benefit would be gained from said transfer. The Council concluded, however, that if the applicant were to provide a direct pedestrian connection between the site and the Dupont Circle Metro Station substantial public benefit would be established thus upholding the proposed transfer of density from the Euram Building (TR. 37, 38).

16. The Zoning Advisory Council recommended approval of the said application for a planned unit development subject to eleven conditions; relating to applying for zone change from SP to C-3-B, the number of buildings to be developed on this property, a specific overall floor area ratio for the entire property, specific limits on gross floor area to be transferred to the new building, an established height limit for the new building, specific uses allowable in the new building, a maximum number of parking spaces to be allowed in the new building, convenient and secure parking to be provided for a specific number of bicycles in the building, a pedestrian connection across 19th Street to the Dupont Circle Metro Station, vehicular access to the new building from New Hampshire Avenue at one point, and a landscaping plan accompanying the final application for a planned unit development (TR. 38-40).

17. The National Capital Planning Commission recommended approval of the preliminary application provided that certain conditions relating to the preservation of the Christian Heurich Memorial Mansion, Carriage House and grounds to be made a part of the approval of the preliminary application, pursuant to paragraph 7501.38 of the Zoning Regulations and part of the Order approving the final application, pursuant to paragraph 7501.393 of the Regulations, said conditions to run with the land pursuant to paragraph 7501.53 of the Regulations (TR. 70). The said conditions were attached to the report of the Planning Commission (TR. 70) and entered as an exhibit in the exclusive record of the public hearing (TR. 80).

18. The conditions relating to the preservation of the Heurich Mansion were approved by Counsel for the applicants, the General Counsel of the Planning Commission and the office of the Corporation Counsel for the District of Columbia (TR. 73).

19. The Joint Committee on Landmarks of the National Capital recommended approval of the preliminary application (TR. 76). Stating that the cost of maintaining the Heurich Mansion is immense and that the Columbia Historical Society has been "hard pressed" to maintain the Mansion, and that its preservation would be assured through agreement of the parties to create a trust fund to specifically preserve the mansion (TR. 77).

20. Counsel for the Columbia Historical Society, George Scheitwzer, testified that the Society has been operating under a financial strain due in part to cost of maintaining the property, and that there is a substantial amount of maintenance needed, with some repairs having been deferred because of the inability of the Society to pay for them (TR. 201). The Society requested that this Commission condition the requirements of the proposed conditions relating to the preservation of the Mansion upon exemption of future real estate taxation, because it could not adhere to the conditions and pay the real estate taxes (TR. 205).

21. The proposed conditions relating to the preservation of the Heurich Mansion as referred to above, contain provisions relating to the following areas:

a. The Society shall use its best efforts to maintain the Heurich Mansion, Carriage House

and grounds in good condition and repair, to prevent exterior and interior deterioration.

b. The Society shall place all money received from the Dupont Circle Joint Venture in consideration for the transfer of its unused floor area ratio in an income producing trust, and the Society can use the trust income and principal, in its discretion, for the maintenance and upkeep of the Mansion, grounds and buildings. If such income from the trust exceeds the cost of maintainance and upkeep the Society can use the excess for any other purposes deemed proper.

c. No construction, reconstruction or renovation of the exterior or interior of the Mansion or Carriage House shall take place unless approved by the District of Columbia's review committee for the nominations to the National Register of Historic Places.

d. Agents of the nominating committee are permitted to inspect the premises for violations of the conditions.

e. The Society with approval of the Zoning Commission and on the advice of the nominating committee, may erect a library and museum building on the lot.

f. The Society may apply to the Zoning Commission for amendment or termination of the conditions if circumstances make it impossible to comply with the conditions.

22. Considerable and vigorous opposition to this preliminary application, from residents of the neighborhood, was evinced at the public hearing.

CONCLUSIONS OF LAW

1. The planned unit development process is an appropriate means of controlling the development of the subject site.

2. The additional floor area ratio, created pursuant to the Zoning Regulations when property is included in a planned unit development, can legally be allocated to any property in the planned unit development.

3. This preliminary application is appropriate, taking the present character of the area into consideration, because it would encourage stability of the area and the land values therein.

4. The approval of this preliminary application is in harmony with the intent, purpose and integrity of the comprehensive zone plan of the District of Columbia as embodied in the Zoning Regulations and Map.

5. The approval of this preliminary application for a planned unit development is in accordance with the Zoning Regulations of the District of Columbia, as amended, and the Zoning Act (Act of June 20, 1938, 52 Stat. 797), as amended.

DECISION

While the proposed FAR of the new building to be built in the middle of the site was 7.0, the effective FAR of the proposed building due to a concentration of density would have been 9.79. By reducing the overall FAR of the site to 6.5, the effective FAR of the proposed building is reduced to 8.9. The lessening of height and bulk of the proposed building will decrease its visual impact on the immediately adjacent historic landmark, the Heurich Mansion, and will provide a less abrupt height and bulk differential between

the new building and buildings in the immediate area including the Euram and Sunderland Buildings.

Upon consideration of the findings of fact and conclusions of law herein, the Zoning Commission hereby Orders APPROVAL of said preliminary application for a Planned Unit Development subject to the elements, conditions and guidelines hereinafter set forth:

1. An application for a change of zone from SP to C-3-B for that portion of the site currently zoned SP shall accompany the application for final approval.

2. The property shall be developed with no more than five separate buildings. The existing Euram and Sunderland Buildings shall not be increased or decreased in terms of gross floor area, provided that certain minor modifications may be made to the Sunderland Building, as shown on Exhibit 16 of the public hearing.

3. The existing Heurich Mansion, Carriage House and garden shall be preserved. Additional construction on that site for a library and/or auditorium, not to exceed a total of 15,275 square feet of gross floor area, may be approved, but only if the property owner applies to the Zoning Commission for an amendment to the approved Planned Unit Development.

4. The overall FAR for the entire Planned Unit Development shall not exceed 6.5.

5. The new building shall include 82,000 square feet of gross floor area transferred from the Columbia Historical Society property.

6. The new building shall not exceed 130 feet in height. Any roof structures in the excess of that limit, as normally permitted by the Regulations, shall not exceed 17 feet in height.

7. The new building shall be devoted to any uses permitted in the C-3-B District, provided that the ground floor and one half of the first cellar shall be devoted to retail commercial uses, provided further that such retail uses shall not include banks.

8. Parking shall be provided at the rate of one space per 2,000 square feet of gross floor area.

9. A convenient and secure parking area for 25 bicycles shall be provided on the ground level or first cellar level.

10. Vehicular access to the new building shall be from New Hampshire Avenue and shall be restricted to one point.

11. The final design shall contain a pedestrian passage through or around the new building from New Hampshire Avenue to 19th Street. The area of such pedestrian passage will not be included in the calculation of FAR permitted on the site. Such passage shall be fronted and contain entrances to the retail establishments referred to in Item No. 7 above.

12. A plan showing all existing and proposed landscaping shall accompany the final application.

13. All provisions contained in the Proposed Conditions Relating to Preservation of Christian Heurich Memorial Mansion, Carriage House and Grounds, annexed hereto as Attachment Number I, are by this reference made part of this preliminary approval of the Planned Unit Development.

14. Said conditions for preservation shall run with the land.

/s/ Walter E. Washington
WALTER E. WASHINGTON

/s/ John A. Nevius
JOHN A. NEVIUS

/s/ Sterling Tucker
STERLING TUCKER

/s/ George M. White
George M. White

/s/ Richard L. Stanton
RICHARD L. STANTON

ATTEST: /s/ Martin Klauber
Martin Klauber
Executive Secretary

ATTACHMENT NUMBER 1

NATIONAL CAPITAL PLANNING COMMISSION
Washington, D.C. 20576

NCPC File No. 0932

PROPOSED CONDITIONS RELATING TO PRESERVATION OF CHRISTIAN HEURICH MEMORIAL MANSION, CARRIAGE HOUSE AND GROUNDS

(Zoning Commission Case No. 71-30)

October 31, 1972

1. The Columbia Historical Society and any successor in interest (hereinafter called "Society") shall use its best efforts to maintain the Christian Heurich Memorial Mansion, its carriage house and grounds, known as Lot 79 in Square 115 in the District of Columbia (hereinafter called "Landmark"), in good condition and repair to prevent substantial deterioration to the interior and exterior appearance of the Mansion, the exterior appearance of its carriage house and the appearance of the grounds.

2. No construction, reconstruction, renovation or demolition shall be undertaken which would materially alter the exterior appearance and materials of construction of the Landmark, as depicted in the photographs which are annexed hereto and made a part hereof, unless approved by the District of Columbia's review committee for nominations to the National Register of Historic Places or, if the review committee ceases to exist or is no longer composed of, or required to be composed of, at least one historian, architect, and archaeologist, by a similar professional body mutually agreeable to the Society and the National Capital Planning Commission (hereinafter called "Committee") which approval shall not be unreasonably or unduly withheld.

It is understood that this condition is not intended to restrict or prohibit reconstruction, renovation, refinishing, or replanting of the Landmark to repair any damage resulting from any cause whatsoever, including deterioration or wear and tear. Any reconstruction, renovation, refinishing or replanting of the Landmark shall be performed so as to substantially restore it to its present appearance as depicted in the photographs.

3. No construction, reconstruction, or renovation shall be undertaken which would materially alter the interior appearance of the Mansion as depicted in the photographs, unless approved by the Committee, which approval shall not be unreasonably or unduly withheld.

It is understood that this condition is not intended to restrict or prohibit reconstruction, renovation, or refinishing of the Mansion to repair any damage resulting from any cause whatsoever, including deterioration or wear or tear. Any reconstruction, renovation, or refinishing in the Mansion shall be performed so as to substantially restore it to its present appearance as depicted in the photographs.

It is also understood that this condition is not intended to restrict or prohibit the installation of heating, air conditioning, elevator, new wiring, or new piping in the Mansion. Such installations shall be performed in a manner consistent with the preservation of the interior appearance of the Mansion.

4. The agents of the Committee, or a person or persons delegated by it, shall be permitted to come upon the premises to inspect for violations of any of these conditions, *provided* that such inspections shall be at reasonable times and shall not interefere with the day-to-day operations of the Society and *provided further* that the

Society shall be notified at least ten (10) days in advance of any such inspection.

5. If the Mansion or its carriage house is condemned pursuant to section 5-618 of the District of Columbia Code, then the Society shall not demolish the building without the consent of the Committee, which consent shall not be unreasonably or unduly withheld.

6. In the event the Mansion is destroyed or demolished because of condemnation or other causes, then all conditions and restrictions applicable to the maintenance of the Landmark shall automatically be terminated and of no further force and effect and the lot may be improved by a building or building containing the amount of floor area permitted under the then applicable Zoning Regulations of the District of Columbia reduced by the amount transferred to the Dupont Circle Joint Venture.

7. The Society, with the approval of the Zoning Commission, acting upon the advice of the Committee, may erect a library and museum building on the lot. The Society shall submit the site and building plans for the structure, so far as they relate to the bulk, height and appearance, number of stories, color, texture of the materials of exterior construction, provisions for open space, and relation to adjacent structures in the planned unit development, to the Committee. The Committee may make such recommendations, including recommendations for such changes, if any, as in its judgment are necessary and desirable to preserve the historic and architectural value of the Landmark. In the alternative, the Society may erect an underground museum and library, provided such underground building maintains the integrity of the present garden.

8. The Society shall place the money received from the Dupont Circle Joint Venture in consideration for the trans-

fer of its unused Floor Area Ratio in an income producing trust, administered by the Society, and shall use the income and may use the principal, in its sole discretion, from the trust for the maintenance of the Landmark, any necessary reconstruction, renovation, refinishing, replanting or installation, as authorized under Conditions #2 and #3, and all operating costs, including the salaries of the personnel required for the maintenance, security, and day-to-day operation of the Landmark.

If the income from the trust fund exceeds the amount of money necessary for maintenance and any reconstruction, renovation, refinishing, replanting or installation, and operating costs, then such excess may be used by the Society for any other purposes it deems necessary or proper.

9. The Society agrees that these conditions (or those in effect after any changes made under Condition 10 or otherwise) will be inserted by it in any subsequent deed, or other legal instrument, by which the Society divests itself of either the fee simple title to or its possessory interest in the Landmark.

10. The Society may apply to the Zoning Commission for amendment or termination of these conditions in the event circumstances arise which, in the opinion of the Society, make it impossible or infeasible for the Society to comply with these conditions.

APPENDIX E

DISTRICT OF COLUMBIA
COURT OF APPEALS

Filed Apr 19, 1976
Alexander L. Stevas
Clerk

No. 8237, 9159 January Term, 1976

DUPONT CIRCLE CITIZENS ASSOCIATION,
Petitioner,

v.

DISTRICT OF COLUMBIA ZONING COMMISSION,
Respondent.

BEFORE: Reilly, Chief Judge and Yeagley and Mack, Associate Judges.

ORDER

It is ORDERED, sua sponte, that the opinion filed herein on March 12, 1976 is amended as follows:

(1) On page 8 delete the first two sentences of the last paragraph and insert the following:

> Similarly petitioner's complaint that the Commission should have filed proposed findings necessarily fails. Rule 2.622 only requires service of proposed findings on "any party who appeared and participated in the hearing . . . ."

(2) At the top of page 10 change "Section 1.64" to read "Section 1.61".

PER CURIAM.

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Norman M. Glasgow, Esquire
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APPENDIX F

DISTRICT OF COLUMBIA
COURT OF APPEALS

Filed Jan. 19, 1976
Alexander L. Stevas
Clerk

No. 8237 & 9159 January Term, 1976

DUPONT CIRCLE CITIZENS ASSOCIATION,
Petitioner,

v.

DISTRICT OF COLUMBIA ZONING COMMISSION,
Respondent.

NELLO PICCA & CLAUDE BENNER, JR.,
as TRUSTEES FOR EURANIA ASSOCIATES.
Intervenor.

BEFORE: Reilly, Chief Judge, and Yeagley and Mack, Associate Judges.

JUDGMENT

The above-consolidated causes came on for consideration on the record on review and the briefs of the parties and the Court heard argument of counsel. Upon consideration thereof, it is

ORDERED and ADJUDGED that the orders on review herein be and the same hereby are affirmed. The opinion of the Court will be filed at a later date and accordingly, it is

FURTHER ORDERED that petitioner's time for filing a petition for rehearing or rehearing *en banc* is extended for a period of 14 days following the filing of the Court's opinion.

PER CURIAM.

FOR THE COURT:

/s/ Alexander L. Stevas
ALEXANDER L. STEVAS,
Clerk.

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Supreme Court, U. S.
FILED
OCT 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-436

DUPONT CIRCLE CITIZENS ASSOCIATION,

Petitioner,

v.

DISTRICT OF COLUMBIA ZONING COMMISSION

and

NELLO PICCA,

and

CLAUDE L. BENNER, JR.
Trustees for Eurania Associates
(Intervenors of right before the District
of Columbia Court of Appeals)

Respondents.

BRIEF OF RESPONDENTS NELLO PICCA and CLAUDE L. BENNER, JR., TRUSTEES FOR EURANIA ASSOCIATES, (INTERVENORS OF RIGHT BELOW) IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-436

DUPONT CIRCLE CITIZENS ASSOCIATION,

Petitioner,

v.

DISTRICT OF COLUMBIA ZONING COMMISSION

and

NELLO PICCA,

and

CLAUDE L. BENNER, JR.
Trustees for Eurania Associates
(Intervenors of right before the District of Columbia Court of Appeals)

Respondents.

BRIEF OF RESPONDENTS NELLO PICCA and CLAUDE L. BENNER, JR., TRUSTEES FOR EURANIA ASSOCIATES, (INTERVENORS OF RIGHT BELOW) IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals below is reported as *Dupont Circle Citizens Association v. District of Columbia Zoning Commission*, 355 A.2d 550 (1976.) The opinion of the District of

Columbia Court of Appeals decided September 24, 1976 in a related case concerning further processing of the subject Planned Unit Development (PUD) before the District of Columbia Board of Zoning Adjustment appears in the Appendix hereto. (Appendix A). In that case, known as *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment, Dupont Circle Joint Venture, Nello Picca and Claude L. Benner, Jr., Trustees for Eurania Associates, Intervenors*, No. 10070 (District of Columbia Court of Appeals, September 24, 1976) the District of Columbia Court of Appeals affirmed the decision of the District of Columbia Board of Zoning Adjustment granting further processing of the subject PUD. Petitioner has referred to this case in its various applications for extensions of time in which to file its Petition for Writ of Certiorari.

QUESTIONS PRESENTED

I. Whether Petitioner has raised any Federal Question which entitles it to a review by this Court of the Decision of the District of Columbia Court of Appeals on a local zoning issue.

II. Whether Petitioner is entitled to:

A. A reassessment by this Court of the evidence of record already heard, reviewed and passed upon by the District of Columbia Zoning Commission, an expert zoning administrative body, whose decision was affirmed by the District of Columbia Court of Appeals, the highest local court of the District of Columbia.

B. A review by this Court of the interpretation of a local District of Columbia statute by the District of Columbia Court of Appeals which is fully supported by that court's opinion, and for a party who can claim no direct injury as a result of that interpretation.

C. A consideration by this Court of the natural and logical consequence of the decision of Petitioner's counsel to withdraw from a public hearing in an administrative proceeding as a deprivation of procedural due process by the District of Columbia Zoning Commission.

COUNTER-STATEMENT OF THE CASE

This case involves preliminary and final applications for approval of a Planned Unit Development (PUD) under Article 75 of the Zoning Regulations of the District of Columbia. The subject property consists of a triangular piece of land of over 66,000 square feet located in Northwest Washington and bounded by Dupont Circle on the North, 19th Street on the East, Sunderland Place on the South and New Hampshire Avenue on the West. The property includes three improvements – the Euram Building on Dupont Circle, the Christian Heurich Memorial Mansion at the corner of New Hampshire Avenue and Sunderland Place, and the Sunderland Building at the corner of Sunderland Place and 19th Street – and a parking lot in the middle of the property to be improved by a new 12 story office building with retail uses on the first floor and part of the first basement. The PUD included a zoning change from the SP District (limited office, apartment and parking uses) to the C-3-B District (major business and employment center) for a portion of the property, the remainder of the property already being located in the C-3-B District.

Section 7501.1 of the Zoning Regulations of the District of Columbia (hereinafter, "Zoning Regulations") describes the purposes of a PUD as follows:

> 7501.1. *Purposes of Planned Unit Development.* The purpose of this section is to encourage, in the various zoning *districts* in keeping with the intent

and purpose of each district, the development of well-planned residential, institutional and commercial developments, industrial parks, urban renewal projects or a combination thereof, which will offer a variety of building types with more attractive and efficient overall planning and design without sacrificing creative and imaginative planning.

The procedures and standards established herein are intended to permit, with Zoning Commission approval, diversification in the use, size, type, and location of *buildings* and *structures*, and to improve circulation and site facilities while at the same time insuring adequate standards relating to public health, safety, welfare and convenience in the use and occupancy of *buildings*, *structures*, and other facilities in planned building groups consistent with the spirit, intent and purpose of the Zoning Regulations.

> While providing for flexibility in design, a *planned unit development* should not be used to circumvent the intent and purpose of the general provisions of the Zoning Regulations. Increases in *building height* and density are permitted as an incentive to allow flexibility of development; however, such increases should not be granted when (a) a [sic] conflict with the development plans and policies of the District of Columbia; (b) they do not enhance the neighborhood; or (c) they do not provide future occupants of *planned unit developments* with a living and/or working environment and amenities superior to those which can be achieved by applying the general provisions of the Zoning Regulations. (Italicized words are in original, indicating terms defined in the Zoning Regulations.)

The PUD process before the District of Columbia Zoning Commission involves two public hearings, one on the preliminary application and one on the final application. Zoning Regulations, §§7501.37 and 7501.391. After the first public hearing, the Zoning Commission either rejects or gives preliminary approval to the PUD. If it approves the PUD then it sets forth the appropriate zoning classification for the PUD and states in detail the elements and guidelines which shall be followed by the developer in his final application. Zoning Regulations §7501.38.

In the final application, the Zoning Commission considers the PUD in more specific detail, in the context of the elements and guidelines set forth in its preliminary approval. The Zoning Commission reviews such items as the height, bulk, lot coverage and location of buildings, the location and number of off-street parking spaces and loading berths, existing and/or proposed public and private rights-of-way and easements, and the types and locations of uses. Zoning Regulations §7501.39. In accordance with the purposes of the PUD process, the Zoning Commission attempts to achieve overall planning and design advantages with the voluntary cooperation of property owners. The benefits which the Zoning Commission achieved through the present PUD include the following:

> A new commercial retail development which would support and serve the Dupont Circle subway station by providing retail commercial uses at the ground level and first basement and pedestrian arcades facilitating access to the subway station.
>
> Development of a free-standing building through setbacks which would preserve the accessibility of light and air to the existing improvements on the site and would afford greater light and air to the occupants of the new office retail building.
>
> Assistance to the Columbia Historical Society in the preservation of the Christian Heurich Memorial

Mansion by permitting it to sell and transfer a portion of its development rights to the property in the middle of the site, thereby furthering the ends of historic preservation while at the same time maintaining the density of development for the entire site within the limits of the allowed density in the C-3-B District.

Elimination of an unattractive and environmentally undesireable open parking lot.

The proceedings before the Zoning Commission were quasi-judicial, with trial type hearings conducted on the record and cross-examination permitted. *Capitol Hill Restoration Society v. D.C. Zoning Commission,* 287 A.2d 101 (D.C. App. 1972) the Zoning Commission received testimony from the following governmental agencies and individuals in support of the application at the public hearings on both the preliminary and final applications:

–The District of Columbia Zoning Staff;

–The Zoning Advisory Council (D.C. Code (1973) Section 5-417 – abolished by the District of Columbia Self Government Governmental Reorganization Act, Section 492(b) Pub. L. 93-198, Title IV §492(b));

–The National Capital Planning Commission;

–The Joint Committee on Landmarks of the National Capitol;

–The National Trust for Historic Preservation;

–The Applicant property owners, who submitted testimony from the following:

A representative of the applicant as property owner;

The attorney for the Columbia Historical Society;

The Treasurer for the Columbia Historical Society;

Owners of the Sunderland Building and Euram Building;

The architect of the proposed new office building;

A land planning consultant who qualified as an expert witness;

A traffic consultant who qualified as an expert witness.

The Dupont Circle Citizens Association, Petitioner herein, was represented by counsel before the Zoning Commission throughout the proceedings and at all of the public hearings. The Dupont Circle Citizens Association submitted no expert testimony but confined its presentation to statements of counsel and testimony from one or two of its members.

The Zoning Commission considered the superior design features, the public amenities, the support for the subway system and the furtherance of the goals of historic preservation which would be accomplished by the approval of this PUD, and it decided that the PUD should be approved. The District of Columbia Court of Appeals affirmed the Zoning Commission's decision, stating in part:

"We have examined the record and conclude that there was substantial evidence to support the decision of the Commission. The Commission is the authority charged by Congress with interpreting and enforcing the Zoning Laws and Regulations of the District of Columbia. As long as its proceedings were according to law, its decision will carry a presumption of regularity on appeal and this court will not weigh the evidence and substitute its judgment for that of the Commission.[13]

"Finding the other contentions of petitioner to be without merit, the orders appealed from are affirmed.

[13] *Brawner Building, Inc. v. Shehyn*, 134 U.S.App.D.C. 125, 130, 442 F.2d 847, 852 (1971); *Salyer v. McLaughlin*, 100 U.S.App.D.C. 29, 31, 240 F.2d 891, 893 (1957); *Lewis v. District of Columbia*, 89 U.S.App.D.C. 72, 74, 190 F.2d 25, 27, (1951); 3 R. Anderson, American Law of Zoning §21.16 (1968)."

Dupont Circle Citizens Association v. D.C. Zoning Commission, 355 A.2d 550, 560-61 (D.C. App. 1976).

In accordance with the provisions of the Zoning Regulations of the District of Columbia, the property owners submitted the PUD to the District of Columbia Board of Zoning Adjustment for further processing in two stages. Zoning Regulations §7501.4. The Board of Zoning Adjustment granted further processing and the District of Columbia Court of Appeals affirmed the decisions of the Board Zoning Adjustment in *Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment*, D.C. App. No. 10070 (September 24, 1976), contained herein as Appendix A.

REASONS FOR DENYING THE WRIT

I.

PETITIONER IS MERELY SEEKING TO HAVE THIS COURT REASSESS THE EVIDENCE OF RECORD WHICH WAS HEARD, REVIEWED AND PASSED UPON BY THE DISTRICT OF COLUMBIA ZONING COMMISSION, AN EXPERT ZONING ADMINISTRATIVE BODY, WHOSE DECISION WAS AFFIRMED BY THE DISTRICT OF COLUMBIA COURT OF APFEALS, THE HIGHEST LOCAL COURT OF THE DISTRICT OF COLUMBIA.

Petitioner has argued that the decision of the District of Columbia Zoning Commission to grant the subject Planned Unit Development (PUD) was based solely on its

desire to achieve the objective of historic preservation, that there was no evidence whatsoever before the Zoning Commission that the transfer of development rights involved in this PUD was "necessary" to achieve historic preservation, that the Zoning Commission's findings on historic preservation are therefore "totally devoid of evidentiary support" and that as a consequence Petitioner has been denied due process of law. All of the above arguments are without basis.

The District of Columbia Zoning Commission did not base its decision wholly, or even primarily, upon a desire to achieve historic preservation by permitting the sale and transfer of development rights from the Christian Heurich Memorial Mansion property to the adjacent property to be developed with a new office-retail building. Rather, as the District of Columbia Court of Appeals recognized, the Zoning Commission only ". . . gave *consideration* to historical preservation in weighing the transfer and sale of development rights and the merits of the P.U.D." *Dupont Circle Citizens Association v. D.C. Zoning Commission*, 355 A.2d 550, 558 (D.C. App. 1976). (Emphasis added.)

The record before the Zoning Commission was not devoid of evidence which would support a finding that the transfer of development rights was necessary in order to raise the funds required to preserve the Christian Heurich Mansion. A plain reading of the Zoning Commission's Order, Appendix C to the Petition for Writ of Certiorari, (as well as a reading of the Petition for Writ of Certiorari itself), reveals that there was sufficient evidence in the record of this case for the Zoning Commission to make such a finding. Petitioner disputed that evidence, but it never offered any evidence to the contrary. Petitioner is now asking this Court to reassess the evidence and to substitute its judgment for the

judgment of the Zoning Commission and of the District of Columbia Court of Appeals. This Court has stated many times, however, that it will not grant a Writ of Certiorari merely to reassess the evidence of record. See *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951); *General Talking Pictures Corporation v. Western Electric Co.*, 304 U.S. 125 (1938).

Petitioner is obviously attempting to arrogate to itself in these administrative zoning proceedings the rights of a defendant in a criminal case. The cases which it has cited, such as *Garner v. Louisiana*, 368 U.S. 157 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960), are criminal cases involving situations where the record before the trial court was not simply deficient, but actually had no evidence whatsoever to support the result reached. In the present case, to the contrary, there is ample evidence in the record to support the decision of the Zoning Commission affirmed by the District of Columbia Court of Appeals. Even assuming *arguendo* that there is no evidence whatsoever on the issue of historic preservation which would support the findings of the Zoning Commission, nonetheless the achievement of historic preservation was not the sole basis for the grant of the PUD. Therefore, eliminating the historic preservation basis does not diminish the other evidence of record and could not change the result.

This case involves nothing more than a zoning decision which must be measured by the controlling decisions of this Court in *Euclid v. Ambler Realty, Co.*, 272 U.S. 365 (1926); *Zahn v. Board of Public Works*, 274 U.S. 325 (1927); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Eastlake v. Forest City Enterprises, Inc.*, U.S. , 49 L.Ed.2d 132 (1976); and *Young v. American Mini Theatres*, U.S. , 49 L.Ed.2d 310 (1976).

In *Euclid v. Ambler Realty Co., supra*, this Court had before it for the first time a complex zoning ordinance regulating height, density and use of property. The Court stated the controlling zoning principle that

> "... it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." 272 U.S. at 395. (Citations omitted).

The Court upheld the comprehensive zoning ordinance on the basis that it was a legitimate effort to cope with the complex land use conditions of that time, and that its provisions did not pass beyond the bounds of reason. 272 U.S. 387, 389.

In *Zahn v. Board of Public Works*, 274 U.S. 325 (1927), this Court reaffirmed the *Euclid* case and further stated that even where it is fairly debatable whether a determination was "an unreasonable, arbitrary or unequal exercise of power," "this court . . . will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." 272 U.S. at 328.

More recently in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), this Court stated through Justice Douglas:

> "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clear air make the area a sanctuary for people." 416 U.S. at 9.

Thus, zoning bodies may not only use the police power to prevent adverse conditions but in addition they may use it to promote beneficial conditions. This is particularly applicable to the present case, where the District of

Columbia Zoning Commission sought to achieve a range of public amenities and benefits with the cooperation of property owners, which through an exercise of its legislative discretion it found to be desirable.

In another recent decision, *Eastlake v. Forest City Enterprises, Inc.*, U.S. 49 L.Ed.2d 132, 139 (1976), this Court reaffirmed the principle stated in *Euclid v. Ambler Realty Co., supra.*

Most recently, in *Young v. American Mini Theatres,* U.S. 49 L.Ed.2d 310 (1976), this Court reviewed a Detroit zoning ordinance regulating the location of adult movie theaters. The Court found that the ordinance was not unconstitutional, and it stated the principle,

> "The record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect. [Footnote omitted]. It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed the reasonable opportunity to experiment with solutions to admittedly serious problems." U.S. , 49 L.Ed.2d at 326-27.

The above decisions of this Court in zoning cases, and not the decisions involving the rights of defendants in criminal cases, are the measure by which this Petition for Writ of Certiorari must be judged. This Court should not put itself in the position of revaluating the evidence of record on which an expert zoning body has made its decision, affirmed by the highest local court of the jurisdiction. The Petition for Writ of Certiorari and Brief in Opposition reveal that the action of the Zoning Commission was not "clearly arbitrary and unreasonable,

having no substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty, Co.*, 272 U.S. at 395. At the very minimum, it was "fairly debatable." *Zahn v. Board of Public Works, supra.*

The good faith efforts of the Zoning Commission to deal with the complex modern problems of regulating land use should be accorded high respect, and the Zoning Commission should be afforded the opportunity to experiment with positive solutions to these problems. *Young v. American Mini Theatres, supra.* Here, the Zoning Commission has acted for sound reasons, on the basis of substantial evidence, and with the voluntary cooperation of property owners, to achieve desirable land use objectives. This Court should continue to refuse to substitute its judgment for that of local zoning administrative bodies.

II.

THE DISTRICT OF COLUMBIA COURT OF APPEALS' INTERPRETATION OF THE UNIFORMITY PROVISIONS OF THE DISTRICT OF COLUMBIA ZONING ACT, D.C. CODE (1973 ed.) §5-413, IS LOGICAL AND FULLY SUPPORTED BY ITS REASONING, AND IN ANY EVENT PETITIONER CAN CLAIM NO DIRECT INJURY AS A CONSEQUENCE OF THIS INTERPRETATION.

The District of Columbia Court of Appeals reviewed and rejected Petitioner's challenge under the uniformity provisions of the District of Columbia Zoning Act, D.C. Code 1973 §5-413, at *Dupont Circle Citizens Association, supra,* 355 A.2d at 558-59. The court considered decisions from Pennsylvania and California and the treatise of Anderson, *American Law of Zoning,* in interpreting this matter of first impression in the District of Columbia. It reached its decision on the basis of an

interpretation of the clear, unambiguous statutory language. The court stated, citing Anderson, *supra,* that the Zoning Act

> ". . . requires that only the regulations be applied uniformly to all property throughout a district, all owners of the same class being treated alike. The uniformity provision does not prohibit a classification which is reasonable." 355 A.2d at 559.[1]

The District of Columbia Court of Appeals properly did not involve itself in the legislative question whether PUD's, including the transfer of development rights, were a good or a bad zoning device. It simply interpreted the Zoning Act as written. Petitioner's attempt to raise constitutional implications from the Court's interpretation is groundless. This Court has often expressed its great reluctance to review a determination of a question of local law by the District of Columbia courts. It has stated,

> "Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere. District of Columbia v. Pace, 320 U.S. 698, 702, 88 L.Ed. 408, 410, 64 S.Ct. 406; Busby v. Electric Utilities Employees Union, 323 U.S. 72, 74, 75, 89 L.Ed 78, 79, 80, 65 S.Ct. 142." *Fisher v. United States,* 328 U.S. 463, 476 (1946). See also *Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

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[1] On the basis of the case law before it, the Court clearly rejected the opinions cited by Petitioner in Williams, *American Land Planning Law.* Petition for Writ of Certiorari at 14-15. There is no sound basis for interpreting the PUD regulations as contrary to the Zoning Act, and so the District of Columbia Court of Appeals acted correctly.

The District of Columbia Zoning Act is not a part of a national legislative scheme such as the statute in *Unemployment Compensation Commission v. Aragan,* 329 U.S. 143 (1946) which was a part of the nationwide legislative scheme for unemployment compensation induced by the Social Security Act of 1935. This interpretation of the District of Columbia Zoning Act does not acquire the stature of a Federal Question simply because the Act is based upon a standard statute which has been used elsewhere in the country. It is a decision involving a local District of Columbia statute and thus, a case where the Supreme Court would ordinarily not grant a Petition for a Writ of Certiorari.

Furthermore, even assuming *arguendo* that the court's interpretation of the uniformity provisions does give rise to a Federal Question, nonetheless Petitioner is not the proper party to raise that question. Petitioner has challenged the uniformity provisions from the point of view of an "owner of a single ordinary sized lot, acting alone." Petition for Writ of Certiorari at 15. Petitioner has stated

> "Thus, by its nature as well as by its explicit language, the D.C. PUD Ordinance 'encourage[s]' large scale 'development' and disfavors smaller property owners. This creates an invidious discrimination based on wealth, offensive to the equal protection and due process clauses." Petition for Writ of Certiorari at 16. (Footnotes omitted).

The record does not disclose that Petitioner or any of its members is the owner of a single ordinary sized lot seeking approval of a PUD under the Zoning Regulations of the District of Columbia. They are not. This Court has recently stated in *Warth v. Seldon,* 422 U.S. 490 (1975),

". . . a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention." (Footnotes omitted). 422 U.S. at 508.

* * *

"Even in the absence of injury to itself, an association may have standing solely as a representative of its members. [Citations omitted]. The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. [Citations omitted]. The association must allege that its members or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." 422 U.S. at 511. See also *Costillo v. McConnico,* 168 U.S. 674 (1898).

Since neither Petitioner nor any of its members are seeking approval of a PUD, they have not placed before this Court a specific, immediate, concrete injury which constitutes a justiciable case that this Court may hear. Consequently, the challenge to the Zoning Ordinance must fail on that basis as well.[2]

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[2]The District of Columbia Court of Appeals found Petitioner's challenge to Article 75 of the Zoning Regulations on the basis that it creates an invidious discrimination based on wealth, "essentially to be a frivolous argument." 355 A.2d at 560. This Court has stricken classifications based on wealth where fundamental rights such as voting rights or the rights of criminal defendants are involved. See *Luben v. Panish,* 415 U.S. 709, 719 (1974). (Concurring opinion of Justice Douglas). This Court has never held that the right to a change in zoning classification (or to oppose a change in zoning classification) is a fundamental right, and in fact it has strongly suggested the contrary in *Eastlake v. Forest City Enterprises, Inc.,* U S. 49 L.Ed.2d 132 (1976).

III.

THE DISTRICT OF COLUMBIA ZONING COMMISSION DID NOT DEPRIVE PETITIONER OF NOTICE OR OF AN OPPORTUNITY TO BE HEARD.

Petitioner's argument that it was deprived of notice and of an opportunity to be heard before the District of Columbia Zoning Commission is wholly without merit and is yet another effort to have this Court reassess the facts decided by the Zoning Commission and reviewed by the District of Columbia Court of Appeals. Petitioner contends (1) that it should have been served with a copy of the final application for approval of PUD filed by Respondents and (2) that its counsel's withdrawal from the public hearing before the Zoning Commission was an uninformed act, attributable to the fault of the Zoning Commission, which deprived Petitioner of the opportunity to submit proposed findings of fact and conclusions of law.

Petitioner does not argue that all of the required forms of notice were not given – publication at least once in two daily newspapers, mailing to owners of property within two hundred (200) feet of the subject property, posting of notice in the office of the Zoning Commission, and posting of the subject property. Rules of Practice and Procedure before the Zoning Commission of the District of Columbia §2.43. The Zoning Regulations of the District of Columbia, as indicated previously, provide for two public hearings on an application for a PUD, and Petitioner does not argue that it was unaware of this requirement and therefore that a second public hearing would be held after approval of the preliminary application. Zoning Regulations, §7501.38. See *Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment,*

D.C. App. No. 10070 (September 24, 1974) Slip Op. at 4, Appendix A at 4a.

Petitioner argues only that the final application papers should have been served upon Petitioner's counsel, though Petitioner did not become an official party to the proceedings before the Zoning Commission on the final application until September 26, 1974. See Appendix B hereto, Petitioner's September 26, 1974 letter to the Zoning Commission contained in the Record of *Dupont Circle Citizens Association v. D.C. Zoning Commission, supra* on the final application at 80. Petitioner concludes that since it was not so served, the final application papers constitute an *ex parte* communication to the Zoning Commission, even though they were filed in the Zoning Commission's office on August 15, 1974 and were a matter of public record from that time on. The public hearing was held on October 2, 1974 nearly seven weeks later. *Dupont Circle Citizens Association supra,* 355 A.2d at 555, Note 4. Furthermore, Petitioner's letter of September 26, 1974 reflects that Petitioner had actual notice of the public hearing and entered an appearance as a party on September 26, 1974. In that letter Petitioner itself incorporated the record on the preliminary application for approval of the PUD as setting forth the grounds for its opposition.

Not only did Petitioner have notice of the time and place of the hearing on the final application, but additionally, as the opinion of the District of Columbia Court of Appeals makes clear, a plain reading of the Zoning Regulations would have given Petitioner notice of the scope of that hearing, if Petitioner did not already

know what that scope would be. *Dupont Circle Citizens Association, supra,* 355 A.2d at 553-55.[3] Therefore, Petitioner's argument that the Zoning Commission should have attempted to persuade its counsel not to withdraw voluntarily from the public hearing on October 2, 1974 is equally without merit. Petitioner's counsel knew or should have known of the scope of the hearing on the final application. He, himself, incorporated the record on the preliminary application into the proceedings on the final application. Appendix B. The Zoning Commission correctly determined, and the District of Columbia Court of Appeals affirmed its decision, that the Zoning Commission could not advise counsel how to proceed with his case. 355 A.2d at 554.

Petitioner's failure to learn of the opportunity to submit proposed findings of fact and conclusions of law was ". . . simply the natural and logical consequence of its counsel voluntarily declining to participate" in the public hearing. 355 A.2d at 555. The Zoning Commission requested that counsel file proposed findings of fact and conclusions of law at the October 2, 1974 public hearing, when its Chairman stated

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[3] Regarding Petitioner's actual notice of the hearing before the D.C. Board of Zoning Adjustment for further processing of Stage I of the PUD, the D.C. Court of Appeals stated, quoting *Clark v. Wolman,* 243 Md. 597, 221 A.2d 687, 688 (1966),

> "The law, in its majesty, is not designed to require futile action or idle gestures. It is well settled that notification purposed to inform may be replaced by actual knowledge. 1 Merrill, Notice, 480. And this is especially so when the knowledge has been acted upon without reliance upon the notification's absence or its defects. Ibid.; *Cassidy v. Baltimore County Board of Appeals,* 218 Md. 418, 146 A.2d 896; 2 Merrill, Notice, 384, 444. [Emphasis in original]." *Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment,* D.C. App. No. 10070 September 24, 1976 Slip Op. at 5, Appendix A at 5a.

> ". . . I will say for the record that counsel in this case will kindly submit proposed findings of fact and conclusions of law within one week after the closing of the record, which is two weeks from the adjournment of this hearing." Transcript of October 2, 1974 Zoning Commission hearing at 72.

Thus the Zoning Commission did not deprive Petitioner of the opportunity to submit proposed findings of fact and conclusions of law. The above quoted statement of the Chairman of the Zoning Commission at the public hearing indicates that the record of the case remained open for two weeks after the close of the hearing, and that counsel in the case had one week after the close of the record in which to submit proposed findings of fact and conclusions of law. Petitioner voluntarily withdrew from participating in the hearings, and furthermore Petitioner's failure during the three weeks after the close of the hearing to determine the status of the case and whether an opportunity to submit findings of fact and conclusions of law existed, constituted a waiver of any rights.

Since Petitioner voluntarily relinquished this right, the situation in *Herring v. New York*, 422 U.S. 853 (1975) could not arise, even assuming, *arguendo*, that Petitioner had the same rights in this zoning case as a defendant in a criminal case. However, this Court has never interpreted the Sixth Amendment's guaranty of assistance of counsel as Petitioner now wishes it to do.[4] In any event, since the record of proceedings remained open for two weeks Petitioner could have submitted any written argument or other materials it wished. The members of Petitioner

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[4]Petitioner has not cited the Sixth Amendment as one of the Constitutional provisions involved in this case.

present at the public hearing on October 2, 1974, surely must have informed Petitioner's counsel of the scope of the hearing, that the at the record would remain open for two weeks and that proposed findings and conclusions could be submitted within three weeks. *Dupont Circle Citizens Association, supra,* 355 A.2d at 555.

The District of Columbia Court of Appeals correctly recognized that there is no requirement in the Rules of Practice and Procedure before the Zoning Commission of the District of Columbia that copies of proposed findings of fact and conclusions of law be served upon other parties. There is no reason for such a requirement since these Rules do not allow any response by parties or other persons to proposed findings of fact and conclusions of law which are filed. Furthermore, such proposed findings of fact and conclusions of law become a part of the public record of the case and therefore are available for inspection by anyone. Additionally, this is not a case where the Zoning Commission adopted as its own findings the proposed findings of fact and conclusions of law submitted by a party. Rather, it wrote its own findings of fact and conclusions of law. *Cf. Matter of Telemart Enterprises, Inc.,* 524 F.2d 761, 766 (9th Cir.), *cert. denied* 44 U.S. Law Week 3531 (March 22, 1976).

CONCLUSION

Respondents suggest that Petitioner has failed to present any substantial Federal Question which would warrant this Court's granting the Petition for Writ of Certiorari. Petitioner seeks only to have this Court reassess the evidence of record, and to reinterpret a local District of Columbia statute already interpreted correctly by the District of Columbia Court of Appeals merely because the results reached are not favorable to it. Petitioner's arguments on notice and opportunity to be heard are without substance.

For the foregoing reasons, the Petition for Writ of Certiorari to the District of Columbia Court of Appeals should be denied.

Respectfully submitted,

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APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10070

DUPONT CIRCLE CITIZENS ASSOCIATION, PETITIONER,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT,

DUPONT CIRCLE JOINT VENTURE, NELLO PICCA and CLAUDE L. BENNER, JR., Trustees for Eurania Associates, INTERVENORS.

Petition for Review of Orders of the District of Columbia Board of Zoning Adjustment

(Argued May 11, 1976 Decided September 24, 1976)

George F. Bason, Jr., for petitioner.

Leo N. Gorman, Assistant Corporation Counsel, with whom *John R. Risher, Jr.*, Corporation Counsel, *Louis P. Robbins*, Principal Assistant Corporation Counsel, and *Richard W. Barton*, Assistant Corporation Counsel, were on the brief, for respondent.

Norman M. Glasgow, with whom *Whayne S. Quin* and *John F. McCabe, Jr.*, were on the brief, for intervenors.

Before KELLY, YEAGLEY and MACK, *Associate Judges*.

YEAGLEY, *Associate Judge*: This is a petition for review of two orders of the District of Columbia Board of Zoning Adjustment authorizing further processing of

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a planned unit development (P.U.D.). The P.U.D. was originally authorized by the D.C. Zoning Commission by Zoning Commission Order No. 81, dated February 1, 1974, granting approval of the preliminary application, and by Zoning Commission Order No. 101, dated December 12, 1974, granting approval of the final application. Petitioner sought review of each of the foregoing orders in this court. They were affirmed by our order of January 19, 1976, which was followed by a written opinion. *See Dupont Circle Citizens Association v. District of Columbia Zoning Commission*, D.C.App., 355 A.2d 550 (1976).

Based upon the approval of the Zoning Commission, two owners of the property in the P.U.D. applied for further processing before the Board of Zoning Adjustment pursuant to § 7501.4 of the Zoning Regulations. Both applications met the approval of respondent District of Columbia Board of Zoning Adjustment, and petitioner, Dupont Circle Citizens Association appealed. We affirm.

The relevant details relating to this planned unit development and the proceedings before the Zoning Commission are set out in full in our previous opinion and need not be restated here. *See* 355 A.2d at 552-53. Suffice it to say that the Commission's order constituted a detailed approval of the application. In its order the Commission said:

> The final approval of this preliminary application for a planned unit development is in accordance with the Zoning Regulations of the District of Columbia, as amended, and the Zoning Act (Act of June 20, 1938, 52 Stat. 797), as amended.

It added that it "ORDERS APPROVAL of said final application for a planned unit development and related

zone change, subject to the elements, conditions, and guidelines hereinafter set forth" (emphasis in original). After specifying sixteen conditions and guidelines the order ended:

> The applicants shall submit the stages and schedule of development with the application for further processing before the Board of Zoning Adjustment.

This court found no error in the proceedings before the Zoning Commission.

I.

The application of Arthur H. Keyes, Jr., to the B.Z.A. for further processing under article 75 of the Zoning Regulations sought permission to make additions and modifications to the first floor and mezzanine levels of the Sunderland Building in implementation of guideline 2 of the order of the Commission. In that guideline the Commission provided "that certain minor modifications may be made to the Sunderland Building, as shown on Exhibit 7 A, B, C & D of the public hearing." The Board of Zoning Adjustment held a public hearing on April 16, 1975, and issued an order approving the development proposals, finding them to be consistent with the plans and guidelines as approved by the Zoning Commission. With regard to the Sunderland case, petitioner asserts only one allegation of error: that the Board failed to give adequate notice of the hearing. Hence it is necessary to determine whether the various notices given by the Board complied with the statute.

Pursuant to 22 DCRR § 3.32, the Board gave notice in the following ways: (1) by publication in *The Washington Star*, a daily newspaper of the District of Columbia (§ 3.321), (2) by mailing notice to the applicant and to the owners of all property abutting the property in-

volved in the application (§ 3.322), (3) by mailing notice to the "occupants" of property situated within 200 feet of the property (§ 3.323), (4) by posting notice in the office of the B.Z.A. (§ 3.324), and (5) by posting notice on the property itself (§ 3.33). Petitioner alleges that the third type of notice listed above is not adequate where, as was done here, the notice was merely stamped "Occupant" and mailed to each particular address on a list supplied by the applicant.

We find this type of notice to be troublesome since a question exists whether it could reasonably be presumed to reach the persons sought to be reached. However, we need not decide that issue in this case. Such notices technically were as required by regulation 3.323, and we are provided no evidence that any such "occupant" was prejudiced or complained of a lack of notice. Since the petitioner had *actual* notice of the hearing, as we find *infra*, it cannot now be heard to complain of such a hypothetical deficiency.

First of all, petitioner knew that there would be a hearing before the Board of Zoning Adjustment since paragraph 17 of Commission Order No. 101 provided: "The applicants shall submit the stages and schedule of development with the application for further processing before the Board of Zoning Adjustment."

The Board of Zoning Adjustment keeps a mailing list of interested individuals and organizations who are sent notices of all Board hearings, including the hearing under consideration, in the form of an advance copy of the monthly public hearing calendar. Petitioner, Dupont Circle Citizens Association, is on that mailing list and at oral argument admitted that it received the particular calendar involved.

In addition, a representative of petitioner was present at the opening session. At the beginning of the meeting when the Board inquired into the status of the petitions for review of the Zoning Commission orders granting the P.U.D., Mrs. Catherine McCarron sought to be heard by the Board. After a brief exchange the following dialogue transpired:

> CHAIRMAN SCRIVENER: . . . Do you, as the representative of the Dupont Circle Citizens Association, the plaintiff in the D.C. Court of Appeals case, object to the hearing of this case this afternoon?
>
> MRS. McCAREN [*sic*]: Yes.
>
> CHAIRMAN SCRIVENER: Why?
>
> MRS. McCAREN [*sic*]: We say this, we are not taking part in a case or in a hearing today that involves a case for zoning which we claim is illegal.

We conclude that petitioner had actual notice of the hearing and cannot now complain of any asserted defect in notice. As the Maryland Court of Appeals has noted in *Clark v. Wolman*, 221 A.2d 687, 688 (Md. 1966):

> The law, in its majesty, is not designed to require futile action or idle gestures. It is well settled that notification *purposed to inform* may be replaced by actual knowledge. 1 Merrill, Notice, 480. And this is especially so when the knowledge has been acted upon without reliance upon the notification's absence or its defects. Ibid.; Cassidy v. Baltimore County Board of Appeals, 218 Md. 418, 146 A.2d 896; 2 Merrill, Notice, 384, 444. [Emphasis in original.]

II.

We turn now to a consideration of B.Z.A. Application No. 11901, the application by intervenors for further

processing of the planned construction of the new office building in the P.U.D. Petitioner alleges several grounds for error which it says require reversal, each of which, we reject.

The first of these relates to the D.C. Conflict of Interest Statute, D.C. Code 1975 Supp., § 1-1181. Petitioner asserts that this statute required the disclosure of the names of the applicant-intervenor's partners and financial backers and that the Board should have demanded that these persons be disclosed. We do not agree.

There is no provision in the Conflict of Interest and Disclosure Act that either authorizes or requires the Board of Zoning Adjustment to compel the disclosure of the partners or the financial backers of parties before it. The entire thrust of the statute is directed at the individual governmental official and the onus is on him to decide whether the action he is to take "would affect directly or indirectly his financial interests or those of a member of his household . . . ." D.C. Code 1975 Supp., § 1-1181(g). The Code provision presumes that the official knows the nature and extent of his and his family's financial interests.

We note that petitioner has not alleged any conflict of interest on the part of any of the Board members. Indeed, there is not even a hint of any impropriety.

III.

Petitioner also alleges that the Board's failure to grant its motion to open to the public the executive meeting at which the final decision was made was error requiring reversal. Petitioner grounds this allegation on two statutory provisions. One is the relatively new Sunshine Act, D.C. Code 1975 Supp., § 1-1503(a), which provides *inter alia*:

> All meetings (including hearings) of any department, agency, board or commission of the District Government, . . . at which official action of any kind is taken shall be open to the public. No resolution, rule, act, regulation or other official action shall be effective unless taken, made, or enacted at such meeting.

We note preliminarily that the decision made here in executive session was a quasi-judicial action in which, historically, only the voting members play a role. The quasi-judicial function of an administrative agency differs completely from the nature of its other activities. The personal and property rights of the parties, at issue in such proceedings, can only be protected, under the American system, in a judicial atmosphere that assures freedom of expression to each deciding official and encourages a free discussion and exchange of views which is so essential to frank and impartial deliberation.

This court recently interpreted the Sunshine Act in *Jordan v. District of Columbia*, D.C.App., —— A.2d —— (No. 9444, August 3, 1976). We held there that to open all meetings to the public

> would effectively prevent the frank exchange of views in private among members of quasi-judicial agencies in reaching a decision—thus putting them on an entirely different footing from appellate courts and juries—to say nothing of federal administrative agencies—where experience has shown that the free flow of discussion unimpeded by the presence or reactions of the parties to the controversy has encouraged fair and just results. [Slip op. at 7.]

The *Jordan* decision is controlling as to the application of the Sunshine Act.

The other provision, relied on by petitioner, is D.C. Code 1973, § 5-420 which provides that "[a]ll meetings of the board [of Zoning Adjustment] shall be open to the public." While at first blush this section might seem to compel the result sought by petitioner, upon consideration of the statutory language it appears that such a result was not intended.

The Maryland Court of Appeals in *Sullivan v. Northwest Garage & Storage Co.*, 165 A.2d 881 (Md. 1960), dealt with virtually identical statutory language and approved decisions made at executive sessions of the Board of Municipal and Zoning Appeals held after the hearing concluded. The court held that the statute required public meetings in adversary proceedings, but not for deliberations of the zoning board when a decision is to be reached. The court saw differences between the term "meetings" which the statute commands are to be public and other proceedings which need not be, and observed:

> [The statute] directs the Board to keep minutes of its "proceedings," which gives the impression that the Board is to function outside of a meeting or hearing, particularly since there is the further language that the Board shall keep records of its "examinations" and "other official actions." All of these things, the mintues, the records of the examinations and the records of other official actions are stated to be public records. [165 A.2d at 883.]

These sections of the Maryland Code are quite similar to our own Code (*see* D.C. Code 1973, § 5-420). The Maryland court went on to say that "[t]he weight of such authority as there is supports our conclusion that the hearings of the Board must be public but that the deliberations of the Board after the hearing is completed may be private." (165 A.2d at 884, citations omitted.)

We find the decision of the Maryland court to be persuasive and consistent with our holding in *Jordan v. District of Columbia, supra*, and we adopt its reasoning for the District of Columbia. Accordingly, we conclude that neither of the aforementioned Code provisions requires that the conference at which the Board considers and decides a case to be public. To hold otherwise would permit outside pressures to substantially affect Board decisions and in view of our traditional concepts of due process would raise a question as to the constitutionality of such a provision.

IV.

Petitioner also questions the propriety of one Board member voting by proxy in favor of the application for the P.U.D. The executive session to decide this case was called by a quorum of the full five-member Board, three members then being present. (Messrs. Harps and McIntosh and Ms. Cummings.) The minutes of the Board show that Chairman Scrivener was absent from the meeting but had "cast his proxies for cases heard on June 18, 1975." The following notation appears in the minutes of the session regarding the vote of the members who heard the case:

> On motion made, duly seconded and carried by a vote 3-1-0 (Mr. Klauber not voting, not having heard the case, Lilla Burt Cummings, Esq., dissenting . . .) to GRANT the above application.

Petitioner asserts that nothing in the D.C. Zoning Act nor in any regulation or rule of the B.Z.A. permits proxy voting and hence Chairman Scrivener's vote was not valid and should not be counted. Accordingly, petitioner argues that the approval is illegal and requires reversal. This contention is based on language in D.C. Code 1973,

§ 5-420 which requires that a clear majority of the Board must approve the application.

Chairman Scrivener had been present at the hearings and heard all of the testimony. He did not designate someone else to vote for him rather he cast his vote in absentia and the Board accepted it. It appears that the Board has recognized the validity of such method of voting for many years. There is no prohibition against voting by proxy in the Code or in the regulations of the Board, and actions of the Board must be accorded a presumption of regularity. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11.06 (1958). The Circuit Court has said that when administrative officials purport to decide weighty issues within their domain there is a "strong presumption of regularity [which] supports the inference that . . . they have conscientiously considered the issues . . . ." *Braniff Airways, Inc. v. C.A.B.*, 126 U.S. App.D.C. 399, 406, 379 F.2d 453, 460 (1967). D.C. Code 1973, § 5-420 provides *inter alia* that "[t]he concurring vote of not less than a full majority of the members of the board shall be necessary for any decision or order." In the instant case a quorum was present as required and the action of the Board in casting and counting votes of its members was not contrary to the law or the regulations of the Board.

Regarding the practical aspects of the operational problems of such a board, Professor Anderson observed:

> As members of the board of adjustment receive little, if any, compensation, they are not in any sense full-time employees of the municipality. Rather, they are citizens who earn their livings at various tasks, and who take time on certain days to render a public service. Their occasional absence is predictable, and some pro-

> cedural concessions have practical justification. [3 R. ANDERSON, AMERICAN LAW OF ZONING § 16.46 (1968) (footnote omitted).]

V.

Petitioner's final allegation of error is that the Board improperly confined the scope of its public hearing, and thus it was unjustifiably presented from presenting exhibits and testimony in opposition to the P.U.D. In addition it asserts that it was not permitted to adequately cross-examine the witnesses put on by the applicant and by the government and hence it was denied due process of law and rights under the D.C. Administrative Procedure Act. D.C. Code 1973, § 1-1509(b).[1]

An examination of the Zoning Regulations, however, does not lend support to petitioner's claim. Regulation § 7501.4 provides for further processing of a planned unit development after it has been approved by the Zoning Commission. The Board's consideration is limited to the matters which are mentioned in that section. It may not go back and reconsider the merits of the case as ruled upon by the Zoning Commission nor may it modify the plans except in certain limited ways.

The applicants submitted plans to the Board based upon the Zoning Commission's order and virtually identical to those approved by the Commission. The applicants purposely attempted to avoid changes in order to accelerate the decision-making process.

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[1] D.C. Code 1973, § 1-1509(b) provides *inter alia*:

> Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . .

The Zoning Division of the Municipal Planning Office, in its report to the Board as to its approval of the application observed: "It is the responsibility of the Board under Paragraph 7501.43 'to implement the planned unit development as finally approved by the Zoning Commission.'" The report also stated:

> This application requests approval for one section of a PUD. Paragraph 7501.42 provides that a PUD may be submitted for further processing to the Board in one or more sections. The plans as submitted by the applicant have been compared to the plans cited in Condition No. 14 of Order No. 101 and to the other conditions contained in that Order. The plans are identical to those submitted to the Zoning Commission except that dimensions have been added to some of the drawings. The proposed building, however, fails to meet two conditions of Order No. 101, as follows:
>
> 1. The plans include 160 parking spaces. With a gross floor area of 301,434 square feet, at a rate of one parking space for each 2,000 square feet of gross floor area (Condition No. 8), only 151 parking spaces should be provided.
> 2. The plans show a penthouse on the roof extending 17 feet above the level of the roof, with an elevator override extending five feet beyond that. Condition No. 6 limits the height of *any* room structure to 17 feet above the level of the roof.
>
> The plans as submitted conform to all the other requirements of Order No. 101.

We conclude that this assessment of the nature and extent of the issues facing the Board is correct. All

other matters had been resolved by the order of the Zoning Commission. The Board properly limited the scope of its hearing to those matters as provided in § 7501.4 *et seq.* of the Zoning Regulations. Though petitioner attempted to reopen many of the issues decided by the Zoning Commission, it was properly prevented from doing so by the Board.

Petitioner asserts, however, that § 7501.47 of the Zoning Regulations[2] requires the Board to make its own specific findings on each of the matters upon which the Zoning Commission had previously ruled in its final approval order. We do not agree. Section 7501.47 must be read in the context of the other provisions in § 7501.4 *et seq.*, defining the scope of its review. It does not demand findings as to *each* requirement of § 7501.39 but only findings "related to" the matters listed in that section. It is a limitation on the scope of review and not a grant of authority.

The Board's findings were all germaine to one or more of the provisions of that section. The Board found in Finding No. 11 that the applicant had "complied with the requirements of Section 7501.39 of the regulations." In Finding No. 7 the Board found that it was merely implementing the Zoning Commission order "with no amendments", and in No. 8 it found the plan to be "in harmony with the objectives of Section 7501 . . . ." In light of the narrow issues to be decided by the B.Z.A. we find no error in the rulings of the

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[2] D.C. Zoning Regs. § 7501.47 provides: "Before approval of the final development plan, the Board shall make findings related to the requirements of paragraph 7501.39." Section 7501.39 requires that the final application for the P.U.D. before the Zoning Commission include nine enumerated items about the specifications of the P.U.D.

Board limiting the scope of petitioner's evidence. We conclude also that the findings were sufficient to meet the requirements of § 7501.47.

Petitioner alleges, however, that a "radical change in circumstances" had occurred between the time of Zoning Commission Order No. 101 and the Board's public hearing thus necessitating the complete reopening of the case.[3] We do not find that the proffer of petitioner in this regard supported its position.

Finding no other allegations of error warranting discussion,[4] the orders appealed from are

Affirmed.

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[3] According to petitioner this "radical change in circumstances" included: (1) "the elected D.C. City Council now has significant responsibility over 'a comprehensive, consistent and coordinated [zoning] plan for the National Capital' "; (2) "two new rezoning decisions by the Zoning Commission itself . . . which are totally at variance with and irreconsilable [*sic*] with this PUD application;" (3) "a new comprehensive planning study by the City's official Planning Office which also is totally at variance with and irreconcilable with this P.U.D. application;" (4) "a new study by the D.C. Department of Environmental Service which shows pollution already at hazardous levels at the site of this proposed PUD;" and (5) "testimony before the Board in another case by the applicant's own traffic expert which is totally contradictory to his earlier testimony . . . ."

[4] In its brief petitioner also incorporated "by reference all the points heretofore raised" in the prior cases before this court (Nos. 8237 and 9159). Petitioner does not say what it wishes us to do with these incorporated "points"; but it makes little difference since the court's resolution of issues raised in that case are, of course, the law of the case on any of the same matters raised here. The arguments which petitioner raises to the contrary in its shotgun approach to this case are specious.

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The Zoning Commission
The District Building
14th & E Streets, N.W.
Washington, D.C.

September 26, 1974

Re: Case No. 74-10/71-30F
Dupont Circle Joint Venture

Gentlemen:

Pursuant to Section 2.44 of the Rules of Practice, this is to advise that the Dupont Circle Citizens Assoc. hereby enters its appearance as a party in the above-identified case.

This office will represent the Assoc., which will appear as an Opponent of the Application.

The manner in which the Assoc. and its members may be affected by action on the Application and the grounds for Opposition are fully set forth in (a) brief for Petitioner *Dupont Circle Citizens Assoc. v. The Zoning Commission* case no. 8237, filed in the District of Columbia Court of Appeals on August 30, 1974, and (b) in the record below of the hearings on the preliminary application conducted on April 25 and June 21, 1973.

Among other possible witnesses who are known to counsel at this time who may testify at the hearing are Ms. Catherine McCarron, Mr. Philip Brown, Ms. Harriet Hubbard, and Ms. Loytle Gracely. This list is not ex-

clusive and other witnesses may testify at the hearing scheduled for October 2, 1974.

Very truly yours,

_____

Nicholas A. Addams

cc: Loytle Gracely, President
DCCA